IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA, Plaintiff,	)	
vs.	)	No. CR 2008-1339
STEVEN CARROLL DEMOCKER, Defendant.	)	

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
WEDNESDAY, APRIL 28, 2010
9:07 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUNTARINESS HEARING AND PRETRIAL MOTIONS

TESTIMONY OF LUIS HUANTE, DAVID RHODES AND JOHN McDORMETT

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

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APRIL 28, 2010
9:07 A.M.

VOLUNTARINES HEARING AND PRETRIAL MOTIONS

APPEARANCES:
FOR THE STATE: MR. JOE BUTNER AND MR. JEFF PAPOURE.
FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY HAMMOND AND MS. ANNE CHAPMAN.

THE COURT: Well, just in case anyone else neglected to take their cell phone out of the pockets or whatever, I remind you of that, because I just did.

This is State versus Steven DeMocker, and his counsel are present, and he is present. And Mr. Butner and Mr. Paupore for the State are here.

(Whereupon, discussion was held re dismissal of prospective jurors, which was reported but is not contained herein.)

THE COURT: The primary issue that I have on the table this morning, because it is an evidentiary hearing for voluntariness issue, my understanding of the stipulation that vacated last week's hearing is that we were going to discuss or have a hearing with regard to voluntariness of statements from the 10/23/08 date this morning.

So, is the State prepared to proceed on that?

MR. BUTNER: State is prepared, Judge.

THE COURT: Defense ready to proceed on that?

MR. SEARS: Yes, Judge.

THE COURT: Mr. Butner.

MR. BUTNER: I would call Detective Huante or Sergeant Huante.

MR. SEARS: Your Honor, we would invoke the rule as to the remainder of the witnesses.

THE COURT: What other witnesses might you have, Mr. Butner?

MR. BUTNER: We have our investigator, who is Detective McDormett, and then also Lieutenant Rhodes is here.

THE COURT: So, if you are designating Detective McDormett as the investigator, I will allow him to stay. Mr. Rhodes is aware of the rule excluding witnesses and how it operates. Why don't I have you come up and be sworn in at this point also, and is Detective McDormett likely to testify also?

MR. BUTNER: I think he may testify rather briefly.

THE COURT: Let's have all three sworn in at the same time

THE CLERK: You do solemnly swear or affirm under the penalty of perjury that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

WITNESSES COLLECTIVELY: I do.

THE COURT: Lieutenant Rhodes, take a seat in the hall. We will get to you as soon as we can.

Mr. Butner.

MR. BUTNER: Thank you, Judge.

LUIS HUANTE,

called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTNER:

Q. Please state your name for the record, sir.

A. Luis Huante.

Q. What is your occupation?

A. Sergeant with the sheriff's office.

Q. How long have you been working with the Yavapai County Sheriff's Office?

A. Approximately seventeen years now.

Q. On the date of October 23rd of the year 2008, were you performing your duties with the Yavapai County Sheriff's Office?

A. Yes, I was.

Q. And what were your duties as of that date?

A. I was the supervisor or sergeant in criminal investigations.

Q. And did you have a particular task that you were performing on that date in connection with Mr. Steven

DeMocker?

A. Yes. We were to go down to Scottsdale or the Phoenix area to the UBS office and arrest Mr. DeMocker.

Q. And were you also serving a search warrant on that date?

A. That's correct.

Q. Tell us, if you will, how this transpired when you arrived at the UBS office where Mr. DeMocker was located?

A. When we arrived, we exited the elevators. I saw Mr. DeMocker. He saw me. And he kind of turned around and proceeded to talk to an individual in a cubical.

Q. So what did you do?

A. I stood behind Mr. DeMocker. He then kind of like ignored me, and walked past me and started walking toward an office, and I called out to Mr. DeMocker.

Q. And did he respond?

A. Yes.

Q. And what took place after that?

A. I identified myself, and I asked him if he remembered me, because we had previous conversations, and he said, yes, he did.

Q. And did you go someplace and continue your conversation?

A. Yes. I asked him if there was an office, and he directed us to an office that he was temporarily occupying.

Q. Who was with you at this time, besides, of course, Mr. DeMocker?

A. It was Detective McDormett and Lieutenant Rhodes.

Q. So did you go into this unoccupied office?

A. Yes. I asked Mr. DeMocker to have a seat, and I also advised him that we needed to inform him of something. At that point Detective McDormett read him his Miranda warnings.

Q. Okay. And you were present when Detective McDormett read those Miranda warnings?

A. Yes, I was.

Q. Did he read them off of the card that you sheriff's deputies are issued?

A. Yes, sir.

Q. You observed that?

A. Yes.

Q. All right. And what took place after that?

A. Mr. DeMocker stated that he understood, and I asked him to have a seat. I advised him that I had a search warrant for this office, for his home on Camelback, and to have a seat while we conduct our business.

Q. Did you then engage in conversation with Mr. DeMocker?

A. Yes. I also asked him if I could search him, which he allowed me to, and then we continued to speak.

Q. And, if you would, tell me what you talked about.

A. We spoke about -- I believe he started speaking -- the first conversation we had was about the golf sock.

Q. Okay. What did you ask him about the golf sock?

A. I believe it was Lieutenant Rhodes who asked him where the golf sock was, or why was it moved from the original location.

Q. And what was Mr. DeMocker's response?

A. He stated he had an answer for that and that his attorney could explain it to us.

Q. So, basically, you were present there while the questioning occurred between Mr. DeMocker and other detectives; is that correct?

A. Yes. At some points I had to step out of the office to answer my phone, due to the fact that I had the search warrant at Camelback and other search warrants being conducted at the same time.

Q. This office that you were in, did Mr. DeMocker indicate this was his office?

A. He said it was a temporary office that he was using.

Q. And was there anybody else present in the office besides Mr. DeMocker, yourself, Lieutenant Rhodes and Detective McDormett?

A. No.

Q. When you were there in the office with Mr. DeMocker, was he seated at his desk?

A. I asked him to have a seat at a chair, not at his desk.

Q. Where were you in the office?

A. I was probably a couple of feet away from him, maybe five or ten feet.

Q. Okay. And were you standing or were you seated?

A. I was standing.

Q. Was Mr. DeMocker cuffed at that time?

A. No, he was not.

Q. Was he placed in custody in some other fashion, so to speak?

A. I asked him to have a seat and, you know, to stay there while we conducted our business. So I kind of restricted his movement, if that is what you were asking, yes.

Q. He was not free to leave at that point?

A. That's correct.

Q. In fact, is that why his Miranda warnings were administered?

A. That's correct.

Q. Who else was present in the room?

A. Lieutenant Rhodes and Detective McDormett.

Q. What were their positions in the room, if you can recall?

A. I would be guessing right now. I don't remember.

Q. Okay. Did you have your guns drawn at any point in time?

A. No, sir.

Q. Did you have any other weapons displayed toward Mr. DeMocker?

A. No.

Q. To your understanding did you make any threats to Mr. DeMocker in any way?

A. No.

Q. And you said that you were in and out of the room while the search warrant was being executed?

A. Yes, and while Lieutenant Rhodes and Detective McDormett spoke with Mr. DeMocker.

Q. Okay. How long were you in the room there with Mr. DeMocker, the three of you, so to speak?

A. If it was an hour -- it was less than an hour.

MR. BUTNER: I don't have any further questions of this witness at this time.

THE COURT: Mr. Sears.

CROSS-EXAMINATION

BY MR. SEARS:

Q. Sergeant, how were you dressed that day?

A. In civilian attire.
Q. Did you have a gun?
A. I usually carry a gun, but it is concealed.
Q. Do you remember how you carried your gun that day?
A. I am sure I had a shirt over it.
Q. Did you have a badge, a visible badge?
A. Yes. I usually carry it in a necklace-type holder.
Q. And you were wearing that that day?
A. I believe so, yes.
Q. How was Detective McDormett dressed?
A. He was also in civilian attire.
Q. Did he have a visible handgun?
A. I don't remember.
Q. How about Lieutenant Rhodes? How was he dressed?
A. Again, civilian attire.
Q. Did he have a visible handgun?
A. I can't remember the last time I saw a gun on him on his waist.
Q. Tell me how you searched Mr. DeMocker.
A. I patted him down.
Q. I am interested in how it was that the decision was made to go down and confront Mr. DeMocker on that day. Did any attorney in the County Attorney's office participate in the decision making process that led to this trip to

Phoenix to confront and question Mr. DeMocker?

MR. BUTNER: Objection. Relevance.

MR. SEARS: I think I can show the relevance here in a minute, Your Honor.

THE COURT: I will allow it, then, in a limited fashion.

MR. SEARS: Thank you.

THE WITNESS: I don't know.

BY MR. SEARS:

Q. Were you present at any meetings or briefings with Detective McDormett and Lieutenant Rhodes in which a plan was developed about how this encounter with Mr. DeMocker was going to be handled?

A. I believe I was present. We all made a plan of how we were going to go down there.

Q. Have you reviewed the tape recording made of your contact with Mr. DeMocker?

A. I believe I did. It was probably about six months ago.

Q. There was no question, was there, that Mr. DeMocker on October 23rd, 2008, was represented by counsel. You all knew that; correct?

A. Sure.

Q. You talked about it repeatedly on tape with Mr. DeMocker; correct?

A. I don't know if it was repeatedly. I think he mentioned you.

Q. He mentioned my name. You knew at that time I was Mr. DeMocker's attorney; correct?

A. I believe he -- one of the statements that he said was that you suggested that you be there.

Q. Right.

A. I believe that is one of the statements he made.

Q. And you knew from prior contact between Carol Kennedy's murder on July 2 and your contact with Mr. DeMocker on October 23rd, 2008, that, in fact, I was representing Mr. DeMocker. You knew that, didn't you?

A. True.

Q. Tell me who in the County Attorney's office authorized contact with a represented individual on October 23rd, 2008?

MR. BUTNER: Again, same objection, Judge.

THE COURT: Overruled.

THE WITNESS: I don't know that.

BY MR. SEARS:

Q. Do you have reason to believe that the County Attorney's office was aware that the Yavapai County Sheriff's Office was going to go to Phoenix and contact Mr. DeMocker on October 23, 2008?

A. Ask again.

MR. SEARS: Can it be read, Your Honor.

THE COURT: Yes. Roxanne, please.

(Whereupon, the relevant portion of the record was read back.)

THE WITNESS: That's possible, yes.

BY MR. SEARS:

Q. What is the basis for that belief?

A. I believe there might have been some sort of meetings that I was not part of.

Q. Why do you believe that?

A. I guess I could be just assuming, too.

Q. In fact, a decision had been made prior to your contact with Mr. DeMocker on that day that you would go to Phoenix, attempt to question him and then arrest him; correct?

A. Yes.

Q. That was, in fact, what happened; correct?

A. Yes.

Q. You went to Phoenix, talked to him without an attorney present, and then arrested him and drove him back to Prescott and booked him; correct?

A. True.

Q. That is what happened?

A. But I did read him his Miranda rights, which he stated he understood.

Q. I understand. Did you answer my question?

A. Yes, I did.

MR. SEARS: I have no other questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BUTNER:

Q. Sergeant Huante, were you part of any meeting in which the Yavapai County Attorney was present and this trip down to Maricopa County to arrest Mr. DeMocker was planned out?

A. No, I was not.

Q. So when you were answering those questions, you were just kind of guesstimating what took place?

A. I was assuming that it happened, but I don't know for a fact.

Q. You don't know?

A. No.

Q. You indicated that you saw Lieutenant Rhodes in civilian attire when you went down there; is that correct?

A. Yes.

Q. And you said that you couldn't remember the last time you had seen him wearing a gun?

A. That's correct.

Q. In other words, I take it from your testimony, he did not have a gun on him that was visible, to your

knowledge?

A. Sure.

Q. At any point in time during this meeting that you had with Mr. DeMocker on October 23rd of 2008, did Mr. DeMocker ask to speak with his attorney?

A. Towards the end of the interview, yes, he did.

Q. And did that conclude the interview?

A. Yes, it did.

MR. BUTNER: No further questions.

THE COURT: Did you want to have Sergeant Huante released now to go about his business?

MR. BUTNER: He may be excused, Judge, as far as the State is concerned.

THE COURT: Any problem with that, Mr. Sears?

MR. SEARS: No objection.

THE COURT: Sergeant Huante, you are excused.

Next witness.

MR. BUTNER: Call Lieutenant Rhodes to the stand, please.

THE COURT: Since you have been sworn, you can just take the stand.

Mr. Butner.

MR. BUTNER: Thank you.

DAVID RHODES,

called as a witness, having been duly sworn, testified as

follows:

DIRECT EXAMINATION

BY MR. BUTNER:

Q. Please state your name for the record.

A. Lieutenant David Rhodes.

Q. What is your occupation, sir?

A. Lieutenant of the Criminal Investigations Bureau at the Yavapai County Sheriff's Office.

Q. And how long have you been with the Yavapai County Sheriff's Office?

A. Approximately 16 years.

Q. And were you performing your duties with the Yavapai County Sheriff's Office on October 23rd of the year 2008?

A. Yes, I was.

Q. Do you recall that particular day?

A. Yes, I do.

Q. Did you have a task on that particular day involving Steven DeMocker?

A. Yes, I did.

Q. What did you do on that day involving Steven DeMocker?

A. I was involved in the execution of a search warrant, or a couple of different search warrants, interview and arrest of Steven DeMocker.

Q. Okay. And did you go down to the Maricopa County area to engage in those activities?

A. Yes, I did.

Q. Approximately what time did you have contact with Mr. Steven DeMocker?

A. It was in the afternoon, approximately two o'clock.

Q. And where did this contact occur?

A. It was at the UBS office on -- I believe it is on Camelback in North Phoenix.

Q. Is it actually the Scottsdale office of UBS, or is it --

A. I think it is actually in Phoenix.

Q. Okay. Approximately the 24th Street area of Camelback?

A. In the area of the Biltmore Plaza, yes.

Q. Would you describe for us how that first contact with Mr. DeMocker was made on that afternoon.

A. Myself and Detective McDormett and Sergeant Huante made contact with Mr. DeMocker in his business, and asked if there was a private place that we could speak to him, and he took us back to an office that he was borrowing from somebody else at the time.

Q. And would you describe the circumstances in that office when you and Mr. DeMocker and the other officers were

present.

A. Yeah. The office -- as I recall, the office had a desk, maybe a book shelf, a couple of chairs for people who may have been meeting with somebody who was sitting at the desk. It was an open office. There was windows to the outside, so people walking down the hall and other offices could see inside where we were sitting. Steven DeMocker and I sat down on the chairs on the opposite side of the desk from where somebody would be working, and as I recall Sergeant Huante and Detective McDormett kind of stood on the side of the desk.

Q. Were you armed on this particular day?

A. I had a concealed weapon.

Q. Where was it concealed, if you could tell us?

A. On my ankle.

Q. And how were you dressed?

A. Plain clothes, shirt and tie and slacks.

Q. And did you have a badge visible?

A. I don't know if I wore my badge on my belt that day or not, but I made it clear to Mr. DeMocker who I was.

Q. And that's where you usually would wear your badge if you are displaying it, on your belt?

A. In plain clothes, I would wear it on my belt.

Q. And do you recall the attire of Detective McDormett in a general sense?

A. He was dressed similar. He was dressed similar. I believe he had a gun and a badge on his belt, if I recall correctly.

Q. Okay. And Sergeant Huante?

A. The same for Sergeant Huante. I believe he had a gun and badge on his belt.

Q. Do you recall if Sergeant Huante's gun was visible or not?

A. I don't recall. I presume that it was.

Q. How about Detective McDormett, do you recall if his gun was visible or not?

A. I don't recall, but I believe that it was.

Q. Did you engage Mr. DeMocker in this office where you were at?

A. Yes, I did.

Q. Tell us what took place in that regard.

A. Mr. DeMocker was read his Miranda warnings by Detective McDormett, I believe. And then we began to ask him questions, and talk to him about why we were there and --

Q. What did you tell him as to why you were there?

A. Specifically, I don't remember the exact words, other than we were investigating the homicide of Carol Kennedy.

Q. Did you tell him he was under arrest?

A. No, we did not.

Q. Did you place cuffs on him?

A. No, we did not.

Q. Was he free to leave?

A. No, he was not.

Q. In fact, that is why you had Detective McDormett read him his Miranda warnings?

A. Correct.

Q. And, if you would, tell us how the conversation began between you and Mr. DeMocker, if you can recall.

A. As I can recall, I had told Mr. DeMocker that we were interested to talk to him about the homicide, that we had a number of questions, that we had been in contact with his attorney who indicated that he may be willing or open to making a statement to us; however, up to that point, that hadn't happened. And so I told him we came down there to talk to him ourselves and ask him some questions, and I told him that he could choose whether or not he wanted to answer those questions.

Q. Okay. Was this interview with Mr. DeMocker recorded?

A. Yes, it was.

Q. Were you the person recording it?

A. I had a recorder, and I believe Sergeant Huante had a recorder also, and maybe even Detective McDormett.

Q. And was a transcript prepared of the interview

that you had with Mr. DeMocker?

A. Yes, it was.

Q. Would you take a look at the exhibit that is laying before you there, and I forgot to take a look at the number.

MR. BUTNER: May I approach, Judge?

THE COURT: You may.

MR. BUTNER: Thank you.

I better look at the number, if I can read it. Exhibit 171.

Q. Would you just go through that for a moment and make sure if you recognize it.

A. (Whereupon, the witness reviews a document.)

MR. SEARS: Could I have the number again, Your Honor?

THE COURT: 171.

MR. SEARS: Thank you, Your Honor.

THE WITNESS: This appears to be a transcript of the interview that we had with Mr. DeMocker in his UBS office on the 23rd of October, 2008.

MR. BUTNER: Okay.

Q. You have that before you to refresh your recollection in the event that you don't recall exactly what took place. Okay?

A. I'm sorry?

Q. You have that before you to refresh your recollection in the event you don't exactly remember what took place. Okay?

A. Okay.

Q. So tell us, you said you began the discussion with Mr. DeMocker indicating to him that you had had contact with his attorney, and you had discussions about the possibility of Mr. DeMocker making a statement, but that hadn't taken place; is that right?

A. That's correct.

Q. And then --

MR. SEARS: Excuse me, Your Honor. I hate to interrupt.

The witness has Exhibit 171 open, and I noticed him just glancing down at it. As Mr. Butner suggested, if he is going to use it to refresh his recollection, I would propose that he turn it over and only look at it when he tells us that he can't remember and needs to refresh his recollection; otherwise, he is going to be testifying from that exhibit.

THE COURT: Given that the exhibit is not admitted for purposes of this hearing at the present time, that is a fair manner in which to proceed. You can do that at this time.

MR. BUTNER: I will just go ahead and go

through the steps, Judge, to have it admitted.

THE COURT: Okay.

BY MR. BUTNER:

Q. Would you take a look at that transcript, please, and make sure that it is an accurate transcript of the interview that you had with Mr. DeMocker on October 23rd of the year 2008.

A. Yes, I will.

Q. Thank you.

A. (Whereupon, the witness reviews a document.)

MR. SEARS: And so now, Your Honor, the witness is going to take an opportunity to read the transcript before he testifies. Same objection.

THE COURT: Overruled.

BY MR. BUTNER:

Q. Have you reviewed that transcript?

A. Yes, I have.

Q. Is it a true and accurate transcript of the recorded interview that you had with Mr. DeMocker on October 23rd, 2008?

A. It appears to be, yes.

MR. BUTNER: I'd move for the admission of Exhibit 171 at this time, Judge.

THE COURT: Presumably only for this hearing.

MR. BUTNER: Correct.

MR. SEARS: May I voir dire the witness?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SEARS:

Q. Lieutenant, have you listened to the audio recording from which that transcript was made?

A. I have not.

Q. So your testimony here just now is that the written transcript comports with your memory of the events of October 23rd, 2008; is that right?

A. That's correct.

MR. SEARS: Foundation.

THE COURT: Mr. Butner?

MR. BUTNER: If I might clear that up, Judge.

THE COURT: Go ahead.

DIRECT EXAMINATION RESUMED

BY MR. BUTNER:

Q. Is this a true and accurate transcript of the conversation that you had with Mr. DeMocker on October 23rd of the year 2008, to your recollection?

A. Yes, it is.

MR. BUTNER: I'd move for its admission on that basis, Your Honor.

MR. SEARS: Same objection.

THE COURT: Overruled.

171 is admitted for purposes of this hearing.

MR. BUTNER: Thank you.

Q. Okay. You indicated that you had wanted to speak with Mr. DeMocker and you were there to talk with him; correct?

A. Yes.

Q. All right. What was the first topic that you touched upon?

A. Well, the first thing that we touched upon is why we were there, and that we understood he had questions for us, and that we had been in contact with -- excuse me -- with his attorney and --

Q. Did Mr. DeMocker indicate to you that he did have questions for you?

A. The exact words that he said, I don't recall without looking at the transcript, but he did state to us that he did want to talk to us.

Q. Okay. And after he indicated that he wanted to talk to you, did you indicate that you also wished to speak with him?

A. Yes.

Q. Did you ask him any questions?

A. Yes, we did.

Q. What did you ask him about?

A. We asked him --- specifically, we asked him about a golf club sock that had been at his house during a search warrant that happened on the morning of July 3rd, 2008, and had been removed from his house by the evening of July 3rd, 2008.

Q. When you say removed from his house by the evening of July 3rd, you mean by the time that the Yavapai County Sheriff's Office representatives had returned to his house with a second search warrant?

A. That's correct.

MR. SEARS: Your Honor, I object to this line. This is irrelevant. This is a voluntariness hearing. What the witness said is not before the Court. It is simply whether the statements were voluntary.

THE COURT: Sustained. And, frankly, presumably if 171 is in, that would describe what the contents of the statements were.

MR. BUTNER: It would.

Q. At any point in time did Mr. DeMocker ask to leave?

A. No, he didn't ask to leave.

Q. At some point in time did Mr. DeMocker ask to speak with his attorney?

A. Yes, he did.

Q. When was that?

A. That was the end of the interview.

Q. Referring to the transcript, you may refresh your recollection, but basically, what did he say in that regard?

A. I am going to refresh my recollection on that.

(Whereupon, the witness reviews a document.)

It would be near the bottom of Page 17.

Q. Okay. And what did he say to you? Don't read, but tell us what your recollection is, please.

A. My recollection is that he was continuing to indicate that he wanted to explain to us what happened; however, he now wanted John Sears to be present when he did that.

Q. Okay. And so did you conclude the interview at that point in time?

A. There was a few more statements back and forth, but yes, we concluded the interview. There was no questions of substance after that.

Q. Okay. And what took place after that?

A. Mr. DeMocker was taken into custody and transported back to Prescott, and John Sears was contacted.

MR. BUTNER: Okay. I don't have any further questions of this witness at this time.

THE COURT: Mr. Sears.

MR. SEARS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SEARS:

Q. Would you look at Page 17 of Exhibit 171 in front of you, please. Tell me where on that page, please, you believe Mr. DeMocker invokes his right to counsel?

A. The last -- second to last entry that says DeMocker. Do you want me to read it?

Q. The one that begins "I, um, uh, I'll, I'm going to talk to John."

A. Correct.

Q. After that on Page 18, you tell Mr. DeMocker that you are going to take him to Prescott, and you have a search warrant for books, and you are going to search various locations that day. You tell him that; correct?

A. Correct.

Q. And then you ask him -- I'm sorry, Detective McDormett asks him, "and you're usually, you've been down here for how many weeks now?" And he answers that question; correct?

A. I'm sorry?

Q. Detective McDormett in the middle of Page 18 asks the question, "and you're usually, you've been down here for how many weeks now?" Mr. DeMocker begins to answer. Detective McDormett interrupts him and says, "you split time between here and Prescott." Mr. DeMocker answers the

question. And you ask him, "and you mainly work up in Prescott?" He answers that question; correct?

A. Correct.

Q. Then McDormett asks him what desk he works out of. He answers that question; correct?

A. No, he doesn't. He says, "whatever one they have free."

Q. That's an answer; isn't it?

A. It is not a specific answer.

Q. It's an answer; isn't it?

A. It's an answer to McDormett's question.

Q. The next question from you is "so you just rotate in here?" He answers that question; correct?

A. Correct.

Q. Then on Page 19, there is more discussion about those books, and McDormett asks him "unless you can tell us where they're at." Mr. DeMocker answers that question; correct?

A. Yes.

Q. And then in the middle of Page 19 you say, "sounds to me that you want to talk to your lawyer, and we're not going to deny you that right." You say that; correct?

A. Yes, I do now.

THE COURT: For my reference that is Page 19.

MR. SEARS: Of the State's transcript, yes,

Your Honor.

THE COURT: Thank you.

MR. SEARS: Exhibit 171.

Q. Let's go back and look at the beginning of this interview on Page 3 in the middle. Mr. DeMocker says, "uh, I, my attorney has suggested that he be around when I talk with you, so, I, ya, I." You say, "well, uh, we." He says, "number of questions in all of this and he's offered to set up a meeting with you guys so --" Then you say, "ya, he hasn't done that though. We've asked him to, but he hasn't."

Those questions and those answers took place in your presence; correct?

A. Yes, they did.

Q. Tell me who in the County Attorney's office approved the trip to Phoenix on October 23rd, 2008, the questioning of Mr. DeMocker and his arrest?

MR. BUTNER: Objection. Relevance.

MR. SEARS: Your Honor --

THE COURT: It assumes a fact not in evidence. Why don't you rephrase.

BY MR. SEARS:

Q. Did anyone in the Yavapai County Attorney's office approve in advance the trip to Phoenix that you and McDormett and Huante took on October 23rd, 2008, to question and arrest Mr. DeMocker?

MR. BUTNER: Objection. Same, relevance.

THE COURT: Relevance of prior to effect discussions for a voluntariness hearing?

MR. SEARS: Couple of serious issues involved here, Your Honor. I think it is well established, and I will quickly re-establish it through this witness, that the County Attorney's office and the Yavapai County Sheriff's Office knew Mr. DeMocker was represented by counsel. It is a serious ethical violation for an attorney to contact, directly or indirectly, a person they know to be represented by counsel, and I want to know how this happened.

THE COURT: I'll sustain the objection on relevancy grounds, as far as the voluntariness hearing is concerned.

BY MR. SEARS:

Q. Did the Yavapai County Attorney's office know that you were going to question and arrest Mr. DeMocker on 10/23/08?

MR. BUTNER: Objection. Relevance.

THE COURT: Sustained.

BY MR. SEARS:

Q. Who in the sheriff's office at a higher rank than you authorized and approved the trip to Phoenix to question and arrest Mr. DeMocker on 10/23/08?

MR. BUTNER: Objection. Relevance. This is a

voluntariness --

THE COURT: Sustained.

MR. BUTNER: Thank you.

BY MR. SEARS:

Q. If you would take a look at Page 8 of your transcript, Exhibit 171, please. Do you have it in front of you?

A. I do.

Q. Page 8?

A. Yes.

Q. You say toward the bottom, "you know, we're, we're trying to, um, we're dying to hear what it was that you had to say about this stuff. And it, and going through your lawyer just wasn't working out, so we thought, you know what, we're gonna take a shot and we're gonna come down and" --

You said that; didn't you?

A. I did.

Q. There was a strategy developed by you and others to circumvent Mr. DeMocker's representation and go down and see if you could get him to talk to you before you arrested him and brought him back from Phoenix. That is exactly what happened; isn't it?

MR. BUTNER: Objection. Argumentative. Assumes facts not in evidence.

THE COURT: Overruled. You may answer.

THE WITNESS: Can you repeat the question.

MR. SEARS: May I have it read back, please.

THE COURT: You may.

(Whereupon, the relevant portion of the record was read back.)

THE WITNESS: The strategy was to contact Mr. DeMocker and attempt to interview him, because we believed that he wanted to talk to us, because that is what we were told by his attorney.

BY MR. SEARS:

Q. Who would be me; correct?

A. Correct.

Q. And you told Mr. DeMocker that attempts to talk to him through me were not working out; correct?

A. I did tell him that.

Q. So you just wanted to see if he would talk to you without counsel present; correct?

A. That's correct.

MR. SEARS: No other questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BUTNER:

Q. When you said to Mr. DeMocker at Line 8, "you know, we're trying to, um, we're dying" -- shouldn't say Line 8. Page 8, "we're dying to hear what it was that you had to

say about this stuff. And it, and going through your lawyer just wasn't working out, so we thought, you know what, we're gonna take a shot and we're gonna come down and" --

What did Mr. DeMocker say to you?

A. Can I refresh my memory?

Q. You may.

A. (Whereupon, the witness reviews a document.)

He said, quote, I am wanting to talk to you guys.

Q. So thereafter you engaged in conversation with him; is that correct?

A. That's correct.

MR. BUTNER: No further questions of this witness.

THE COURT: Any objection to excusing Lieutenant Rhodes?

MR. SEARS: No.

MR. BUTNER: No.

THE COURT: You are excused. If you would leave Exhibit 171, please.

MR. BUTNER: Judge, I may have left a couple of pieces of paper on the back of that exhibit that belong to something else when I made the copies rather hurriedly. If I could remove those.

MR. SEARS: I noticed that and removed them

from my copy and gave them back to Mr. Paupore, so I certainly have no objection to the irrelevant pages being removed from 171.

MR. BUTNER: Thank you.

THE COURT: If we could please do another stamp, have him take off the old one. Have those pages released and admit only the portions that both lawyers apparently thought were in 171.

You are excused, Lieutenant Rhodes. You can stay, if you wish, or leave as you wish.

Is that acceptable as far as the procedure, Mr. Sears?

MR. SEARS: Yes, Your Honor.

THE COURT: Mr. Butner?

MR. BUTNER: That is acceptable, Judge.

THE COURT: The clerk will give you back whatever the irrelevant pages are.

MR. BUTNER: Thank you.

THE COURT: Next witness.

MR. BUTNER: Detective McDormett, please.

THE COURT: You may proceed.

MR. BUTNER: Thank you.

JOHN McDORMETT,

called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTNER:

Q. Please state your name for the record.

A. John McDormett.

Q. What is your occupation, sir?

A. I am a detective with the Yavapai County Sheriff's Office.

Q. How long have you been with the Yavapai County Sheriff's Office?

A. Approximately ten-and-a-half years.

Q. Were you performing your duties with the Yavapai County Sheriff's Office on October 23rd of the year 2008?

A. Yes, sir.

Q. Do you recall making a trip down to Phoenix on that day?

A. Yes, sir.

Q. And what was the purpose of your trip on that date to Phoenix?

A. To interview Mr. DeMocker.

Q. Were you going to do anything else besides chat with Mr. DeMocker on that date?

A. Yes. Arrest him.

Q. And did you also have some search warrants to execute?

A. Yes, sir.

Q. And where did you meet with Mr. DeMocker?
A. At his UBS office in Phoenix.
Q. And, first of all, how were you dressed that particular day, if you can recall?
A. I was in plain clothes.
Q. Okay. Did you have your gun with you?
A. I believe -- yes, I did have my gun with me.
Q. And where was your gun?
A. I believe it was on my side.
Q. And were you displaying your badge?
A. I was displaying my badge and ID in the manner that I am now.
Q. So you had it around your neck?
A. Yes, sir.
Q. And when you -- were you present when Mr. DeMocker was interviewed?
A. I was.
Q. Had he been placed in custody at that time?
A. No, sir.
Q. Was he free to leave?
A. No, sir.
Q. Are you the person that administered his Miranda warnings?
A. I was.
Q. Did you read those warnings from your department

issued card, so to speak?

A. Yes, sir.

Q. And after reading the Miranda warnings to Mr. DeMocker, did he indicate to you that he understood them?

A. Yes, sir.

Q. What did he say to you?

A. Best of my recollection, he said -- I asked if he understood his rights, and he said yes.

Q. And where was this reading of his warnings?

A. In the office that Mr. DeMocker had directed us to.

Q. You heard the testimony in court describing the office. Was this an office that had windows out to the hallway?

A. Yes, sir.

Q. So Mr. DeMocker presumably could look out the windows and see what was going on and you could, too?

A. I could. Mr. DeMocker's position was such that his back was toward the window.

Q. Okay. And in this room where you were located, where were you positioned?

A. I was positioned close to the desk in the room.

Q. Okay. And where was Mr. DeMocker positioned?

A. Mr. DeMocker was positioned in a chair in the -- in a corner of the room, perhaps it was a bench seat, and

Lieutenant Rhodes was positioned next to Mr. DeMocker.

Q. They were both seated beside each other, so to speak?

A. Yes, sir. From what I recall Mr. -- or Lieutenant Rhodes was to the right of Mr. DeMocker.

Q. And were you -- how far away from Mr. DeMocker were you?

A. I was approximately eight to ten feet.

Q. Were you across the desk from him?

A. Yes.

Q. Okay. And where was Sergeant Huante?

A. Sergeant Huante was just to the right of me, approximately two feet, three feet from my position.

Q. Was he across the desk from Mr. DeMocker?

A. No, sir.

Q. He was on the same side of the desk?

A. I was closer to the desk. From the best of my recollection, Sergeant Huante's position was between myself and the door.

Q. And during the course of this interview, was Mr. DeMocker placed in cuffs?

A. No, sir.

Q. During the course of this interview, did Sergeant Huante come and go on occasion?

A. Yes. I believe on two occasions.

Q. So he wasn't present there for the entire interview?

A. No, sir.

Q. Were you present there for the entire interview?

A. Yes, sir.

Q. Was there any effort on your part to intimidate or threaten Mr. DeMocker?

A. No, sir.

Q. Did you see any effort on the part of anybody else in that room with you, either Lieutenant Rhodes or Sergeant Huante, to threaten or intimidate Mr. DeMocker?

A. No, sir.

Q. You indicated that Lieutenant Rhodes was seated while he was chatting with Mr. DeMocker; is that correct?

A. Yes, sir.

Q. And what was the tone of the conversation? Were they shouting at each other?

A. No, sir. It was low key.

Q. Conversational, so to speak?

A. Yes, sir.

Q. And did you observe anybody threaten Mr. DeMocker in any way?

A. No, sir.

Q. Were you present when Mr. DeMocker indicated that he wanted to talk with you guys?

A. I believe he made a statement to that effect.

Q. Okay. And what took place at the end of the conversation with Mr. DeMocker?

A. Could you --

Q. Did anything of significance occur after the conversation was concluded with Mr. DeMocker?

A. No. We escorted -- well, we escorted Mr. DeMocker out and placed him in a vehicle and brought him to Prescott.

Q. When you escorted Mr. DeMocker out, was he in cuffs when you escorted him out of his office?

A. No, sir.

Q. You walked him out?

A. Yes, sir.

Q. And was he placed in cuffs at some point in time?

A. Yes, sir.

Q. Where was that?

A. I believe it was midway between Prescott and Phoenix on I-17, perhaps around Bloody Basin Road.

Q. So he wasn't cuffed even when he was taken to the police vehicle?

A. No, sir.

Q. And who drove him up to Prescott, if you recall?

A. Detective Sergeant Huante.

Q. And where were you?

A. I was in the back seat. I believe Mr. DeMocker

was in the front passenger seat, as to my recollection.

MR. BUTNER: Okay. I don't have any further questions of this witness at this time.

THE COURT: Cross.

MR. SEARS: May I approach the witness, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. SEARS:

Q. Let me show you Exhibit 171 for this hearing, which is a transcript of this interview with Mr. DeMocker. Let me call your attention to Page 3.

Do you have that in front of you?

A. Yes, sir.

Q. Toward the middle of the page Mr. DeMocker says, "uh, I, my attorney has suggested that he be around when I talk with you, so, I, ya, I" -- And Lieutenant Rhodes interrupts him and says, "well, uh, we" -- Mr. DeMocker continues, "number of questions in all of this and he's offered to set up a meeting with you guys, so" -- Lieutenant Rhodes interrupts him again and says, "ya, he hasn't done that though. We've asked him to, but he hasn't."

That is not true; is it?

A. What is not true?

Q. The statement from Lieutenant Rhodes that "we've

asked him to, but he hasn't." That is simply not true; is it?

A. Could you clarify exactly what you are asking me, sir. What is not true?

Q. Lieutenant Rhodes says in response to Mr. DeMocker's statement that his lawyer, me, has offered to set up a meeting with you guys so -- he says, "ya, he hasn't done that though. We've asked him to, but he hasn't."

Do you see that?

A. I see that.

Q. The statement by Lieutenant Rhodes is false, is it not?

A. I don't know, sir. I was not privy to any type of conversation between you and Mr. Rhodes reference your client.

Q. Did you see the letters and e-mails between Rhodes and me prior to October 23, 2008?

A. I may have seen one of those, but I don't recall the content of it.

Q. On October 23, 2008, you were the case agent in this case; is that right?

A. Yes, for about three weeks.

Q. Is it your testimony that on October 23, 2008, you did not know whether or not there had been discussions between Rhodes and me about a meeting with Mr. DeMocker in

which he would answer questions?

A. I do know that there were discussions between you and Lieutenant Rhodes. I don't know what the outcome or the content of those discussions were.

Q. Mr. DeMocker goes on on Page 3 of Exhibit 171, "you've asked him to set up a meeting with me?" Rhodes says "mm,hm. Ya, he sent a, he sent a volley of letters and phone calls and things like that and we've, we tried to set something up, but that hasn't happened. He, he doesn't respond."

That is a false statement; isn't it?

MR. BUTNER: Objection, Judge. He is asking this witness to speculate about what was going on between Mr. Sears and Lieutenant Rhodes. Mr. Sears should have questioned Lieutenant Rhodes about this when he was here. Calls for speculation by this witness.

THE COURT: Just the objection, Counsel, if I could, please.

Sustained.

BY MR. SEARS:

Q. There was a strategy for this October 23, 2008, session that was developed in which you would try to get Mr. DeMocker to give you a statement, even though you knew he was represented by counsel at the time; correct?

A. We went up there for the purpose of speaking

to -- or down there for the purpose of speaking to Mr. DeMocker.

Q. Would you answer my question, please, sir.

A. Could you rephrase the question.

MR. SEARS: May I have it read.

THE COURT: Would you please, Roxanne.

(Whereupon, the relevant portion of the record was read back.)

THE WITNESS: We went -- I believe I answered the question. We down to Phoenix to interview your client.

BY MR. SEARS:

Q. You knew he was represented by counsel on October 23, 2008; didn't you?

A. I had been told that he was represented by counsel.

Q. Did you have any reason to believe that he was not represented by counsel on that day?

A. No, sir.

Q. And nonetheless, you, Rhodes and Huante went to Phoenix in an attempt to get him to make statements knowing he was represented by counsel; correct?

A. Yes.

Q. That was a knowing decision on your part; correct?

A. Yes.

Q. And part of the strategy was to tell him that his

attorney was interfering with the process in which he could talk to you. That was part of your strategy; wasn't it?

A. I didn't have a strategy, sir.

MR. BUTNER: Objection. Assumes facts not in evidence.

THE COURT: I will let the answer stand. He indicated no.

Next question.

BY MR. SEARS:

Q. It is true, isn't it, that on October 23, 2008, Rhodes and you both told Mr. DeMocker that his attorney was not cooperating in setting up a meeting? That is true; isn't it?

A. That is not true.

Q. Did we just read on Page 3 a statement from Rhodes where he says, "we tried to set something up, but that hasn't happened. He doesn't respond." You were there when Rhodes said that to Mr. DeMocker; weren't you?

A. Yes.

Q. On Page 8 -- if you'll turn to Page 8, please.

Toward the bottom Rhodes says, "you know, we're, we're trying to, um, we're dying to hear what it was that you had to say about this stuff. And it, and going through your lawyer just wasn't working out, so we thought, you know what, we're gonna take a shot and we're gonna come

down and" --

You were there when Rhodes said that to my client; correct?

A. Correct.

Q. And you tell me that there was no plan in advance to tell Mr. DeMocker that his attorney was not cooperating. You are telling me that is not true?

A. I believe your question was that Detective Lieutenant Rhodes and I formulated a plan or something to that effect. I just went down there to talk to the guy.

Q. Before you arrested him?

A. Yes, sir.

Q. Without a lawyer present?

A. Correct.

Q. Okay. Is it your impression that eventually toward the end of this conversation, Mr. DeMocker made an unequivocal request for counsel?

A. I'm sorry. Could you repeat that.

MR. SEARS: May I have it read.

THE COURT: If you don't remember it, you may.

(Whereupon, the relevant portion of the record was read back.)

THE WITNESS: I would have to refresh my memory by looking at the end of the transcript to see exactly what Mr. DeMocker had stated.

BY MR. SEARS:

Q. Why don't you look at Page 18, if you would.

A. Yes, sir. I am on 18.

Q. Okay. At the top Rhodes says, "well, if that's what's needed and that's what you're asking for, you're certainly gonna get that. Um, John's not going to do that over the telephone."

Do you see that?

A. Yes, sir.

Q. Just before that Mr. DeMocker starts to say, "I'd just like John to be" -- is that the point at which Mr. DeMocker requested counsel?

A. I don't know.

Q. Did the questioning stop at that point?

A. No, sir.

Q. Thank you.

Looking at the remainder from Page 18 through the end of the transcript, can you find me a place in there where Mr. DeMocker, in your opinion, makes an unequivocal request for counsel.

A. From the top of 18 on down?

Q. Yes, sir.

MR. SEARS: Your Honor, here is my copy.

THE WITNESS: (Whereupon, the witness reviews a document.)

From 18 on down, I don't see any unequivocal invocation of rights.

BY MR. SEARS:

Q. In fact, the questioning of Mr. DeMocker only stopped when you got up to take him back to Prescott. That is when the questions stopped; correct?

A. If I could refresh again.

Q. Sure.

A. (Whereupon, the witness reviews a document.)

It depends on the nature of what type of questioning you are referring to, sir. We did ask him questions such as, "is this your briefcase?"

Lieutenant Rhodes, bottom of Page 19, asks "is there anything that you want to get that's not a bomb or a gun or a knife before we walk out?" Questions of that nature were asked.

Q. And the questioning stopped when you all decided it was time to leave and take Mr. DeMocker to Prescott; correct?

A. Correct.

Q. You know that Mr. DeMocker was interviewed at length on July 2nd and July 3rd, 2008, by law enforcement; correct?

A. Yes, sir.

Q. You know that eventually at the end of much of

that questioning, Mr. DeMocker invoked his right to remain silent and have counsel present; correct?

A. I believe so, yes, sir.

Q. What gave you the idea that it was appropriate for you to re-interview someone who had previously invoked the right to remain silent and the right to have counsel present?

A. Detective Lieutenant Rhodes had mentioned that Mr. DeMocker, seemed to him, wanted to talk to us.

Q. You begin this interview by asking Mr. DeMocker to sit in a particular place because you had things you wanted to talk to him about; correct?

A. Sergeant Huante directed Mr. DeMocker where to sit.

Q. From that moment on, he was not free to go; correct?

A. No, he wasn't.

Q. And shortly after that you read him his rights. You told us that; correct?

A. Yes, sir.

Q. You didn't remind him that he had previously invoked his right to remain silent and his right to have counsel present; correct?

A. No, sir.

Q. You started over again with a new set of Miranda warnings and asked him if he understood; correct?

A. Correct.

MR. SEARS: No further questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BUTNER:

Q. You were present, basically, during the entire conversation with Mr. DeMocker; is that right?

A. Yes, sir.

Q. And were you present -- I draw your attention to Page 8 of the interview.

MR. SEARS: Your Honor, I have my own.

THE WITNESS: Yes, sir.

BY MR. BUTNER:

Q. Were you present when Lieutenant Rhodes was chatting with Mr. DeMocker about talking with you guys, so to speak?

A. Yes, sir.

Q. Do you remember what Mr. DeMocker said in regard to that?

A. I believe he had said that he wanted to talk to us.

Q. Okay. And then going to Page 19 of the interview, were you present when Lieutenant Rhodes indicated to Mr. DeMocker that "it sounds to me that you want to talk to your lawyer"?

A. Can I refresh, please?

Q. Sure. If you would take a look at right in the middle of the page.

A. Yes, sir.

Q. And, in fact, almost right after that -- I think the interview goes on another page -- the interview was terminated; right?

A. Correct.

Q. After you read Mr. DeMocker his Miranda warnings, he indicated that he understood them; right?

A. Yes, sir.

Q. And he went ahead and proceeded to engage in conversation with Lieutenant Rhodes and Sergeant Huante and yourself; right?

A. Yes, sir.

MR. BUTNER: No further questions.

THE COURT: You may step down. Thank you, Detective. I will return Mr. Sears' copy.

MR. SEARS: Thank you, Your Honor.

THE COURT: Thank you.

Any other witnesses, Mr. Butner?

MR. BUTNER: The State has no other witnesses at this time, Judge.

THE COURT: Mr. Sears?

MR. SEARS: I have no witnesses, Your Honor.

THE COURT: Counsel, argument with regard to the issue.

MR. BUTNER: Judge, it is the State's belief that the evidence presented to the Court this morning clearly indicates that the entire conversation with Mr. DeMocker was voluntary on his part. He had been read his Miranda warnings. He could have terminated the conversation at any time. In fact, he clearly stated that he wanted to talk with those guys, so to speak, the officers that were there, and proceeded to have a discussion with them.

They were aware, yes, that he had been represented by Mr. Sears. But Mr. DeMocker was not charged at that time. His Sixth Amendment rights had not attached at that time, and it was a purely voluntary conversation between the detectives and Mr. DeMocker, with Mr. DeMocker actually, by his actions and his communication, waiving his rights to an attorney until he basically invoked. And it really wasn't even an unequivocal invocation of his right to an attorney. Rather, the detectives out of an abundance of caution interpreted some of Mr. DeMocker's remarks toward the end of the interview to indicate that he really didn't want to talk any further without his lawyer being present, and they concluded the interview.

And I think that that clearly demonstrates just how voluntary this entire interview was.

Thank you.

THE COURT: Thank you.

Mr. Sears.

MR. SEARS: Thank you, Your Honor.

We need to remember that Mr. DeMocker was interviewed at great length by the police on July 2nd, July 3rd of 2008, and eventually invoked his right to remain silent, and his right to presence of counsel. His attorney appeared, and that was the end of questioning.

Three-and-a-half months later, after it is abundantly clear on this record that law enforcement and the County Attorney's office knew that Mr. DeMocker was continuously represented by counsel, they decided they would take a chance, and, in fact, they candidly say in the transcript that we have in evidence here, 171, that they were just going to take a chance and see if Mr. DeMocker would talk to them in the absence of counsel, despite the fact that he had previously invoked. They don't remind him of the fact that he had once invoked and exercised his right to remain silent. They simply start again.

But what is more troubling to us is the fact that they lied to Mr. DeMocker, not about some fact that they would be permitted to lie about, but they lied to Mr. DeMocker about his attorney's role in this. Mr. DeMocker expressed on Page 3 of the transcript genuine surprise at

their assertion that his attorney had not communicated with them and had not agreed to interviews or statements. He comes back to that several times during this interview, and each time the police lie to him again, and tell him that it was his lawyer's fault, that they knew he wanted to talk to them, but his lawyer was interfering with that.

That impairs Mr. DeMocker's ability to understand his right to the presence of counsel when they lie to him about what his counsel's conversations and negotiations were with them. That's pretty clear from this record. It is clear that they did this on purpose.

It is probably clear, although the Court has ruled it out of bounds for purposes of this narrow argument, that this was done at the behest of and with the knowledge of the Yavapai County Attorney. A very, very troubling circumstance in this case.

It was clear that they were doing what they could to make Mr. DeMocker think that they just came down for a chat. They led him out not in cuffs. They told him he was in investigative detention. He wasn't cuffed until halfway back. The tape continues to run. They try to get Mr. DeMocker to make statements in the car on the way back, and only when Mr. DeMocker stopped talking and they were approaching Prescott did they decide they would cuff him up and treat him as the person under arrest that he actually

was in this case.

It is a very blatant set of circumstances in this case, and I believe it renders all of his statements involuntary under the law.

THE COURT: Mr. Butner.

MR. BUTNER: Mr. Sears argues a bunch of facts that were not in evidence before the Court. The fact of the matter is, you have the facts before the Court at this point in time.

It is clear that Mr. DeMocker agreed to speak with the guys, that he wanted to talk with the guys. He engaged in conversation with them. It wasn't an intimidating set of circumstances, but rather it was a rather relaxed set of circumstances. And the conversation ultimately, basically, was terminated by the detectives, not Mr. DeMocker.

Yeah, they did candidly admit that they wanted to talk with Mr. DeMocker, and we don't have in evidence the conversations or letter writing or e-mails or any of that between Mr. Sears and Lieutenant Rhodes. But it was clear from the content of this interview that Mr. DeMocker had waived his Miranda rights and was speaking on a voluntary basis with the officers out of his own desire to do so.

And whatever took place in the police car

thereafter, I don't see that that really has anything to do with the voluntariness of those statements, other than to further demonstrate that Mr. DeMocker was not placed in any kind of intimidating circumstances, basically until he was up the highway, so to speak, and ultimately cuffed.

So these statements should be admitted as being voluntarily.

THE COURT: Thank you.

The Court has reviewed Exhibit 171, and some things are apparent from that. The nature of the communication was relatively conversational. This was taking place in an office, not a police agency office, but rather a business office that had windows out to the hallway. Presumably other people coming and going during the course of that business. Although I am not familiar with it, from the description, it sounds like many other business type offices with windows out to the hallway.

So not an intimidating setting, per se, although it was one person being interviewed with several other people present from the police agency. What I am dealing with is not a motion to suppress on Miranda grounds or Sixth Amendment grounds. I'm dealing with the voluntariness hearing, voluntariness request.

And although the issue of Miranda warnings being given is a consideration for determining

strict voluntariness, I don't have any basis on the record that is before me with regard to the police making promises or intimidation. The Sixth Amendment right had not attached yet. The defendant was not in custody, had not been told he was in custody. There weren't overt signs of his being in custody or even investigative detention, until the very end of the transcript. No showing of guns, cuffing of defendant, threats or coercion to induce statements.

So, in terms of strict voluntariness, I find that the statements made during the course of the proceedings, particularly in the absence of an unequivocal request for counsel, are voluntary and are admissible in the State's case in chief, if they are relevant. There may be other issues concerning other grounds for keeping out the statements, but in terms of strict voluntariness, my conclusion is that the statements made in the course of Exhibit 171 are voluntary statements.

So I will grant, I suppose in that sense, the motion of the State to find that the statements on October 23rd, 2008, made by the defendant to Mr. McDormett, Mr. Rhodes and Sergeant Huante are voluntary and admissible.

I think we ought to take a break for everyone's benefit. Let's resume about ten minutes to 11:00.

(Brief recess.)

THE COURT: The record reflects the defendant

is present with all three of his counsel, and both prosecutors for the County Attorney's office are here as well.

We had some motions that are still left. I guess, I don't have any particular order in which I desire to hear them, but I think among them are the State's April 14 motion with regard to certain Knapp evidence, the defendant's motion with regard to shoe print comparisons, defense motion to dismiss aggravating factor, dismiss the death penalty as a sanction for alleged misconduct. A defense motion from April 13, motion in limine with regard to certain evidence or argument concerning matters related to the level of force used or cruel and depraved aspects of -- alleged cruel and depraved aspect of the case.

If there are other issues -- and I think some sanctions issues, motions to preclude relating to other alleged late discovery.

Mr. Hammond.

MR. HAMMOND: Your Honor, we have, I think, almost identically the same list. One item that was on the list of things that we talked about last time was briefing on sequestering the jurors, and if our memories are correct, you had asked for simultaneous briefing on that question. We have provided you with our memorandum.

I do not know whether the State has -- I

don't believe -- I am pretty sure we haven't received it, but sometime today we need to address that question, and it may be Mr. Butner hasn't had time, yet. We ought to do that a little later. It is important.

MR. BUTNER: Thank you, Mr. Hammond.

THE COURT: You will take him up on that offer.

MR. BUTNER: Absolutely. I appreciate that very much. And we are trying to get that together, even as we speak. I apologize for being late on that, but we have been very thinly spread.

THE COURT: When we are talking sequestering, it is in reference to whether the selection process ought to be in open court with public and press and cameras and all of the like in general. So we will get to that later.

What would you like to take up next?

MR. HAMMOND: We have a proposed order, and honestly, there is not a lot of magic in the way we thought about dividing this up, since various people on our team did various motions.

THE COURT: I can tell that.

MR. HAMMOND: Well, I am not sure I should be laughing. What exactly does the Court mean by that?

THE COURT: I just know certain of you have certain specialized interests, I suppose you could say.

MR. HAMMOND: Hyperbole.

I think, Your Honor, among the things that we might want to address first is the motion that we filed to limit expert testimony with respect to the reporting of DNA results, and that is one that I --

THE COURT: That is your line.

MR. HAMMOND: It is my line, and I think that would be a good place for us to start. And since we have had a number of events occur in the last few days with respect to this question in particular, might be the right place for us to start.

The motion itself raises, more accurately I would say, re-raises a question that we raised before with respect to specifically the manner in which DNA results are reported in the testimony of the State's witnesses. And just to give us the lay of the land here, the State still proposes to have experts testify both from the D.P.S., Arizona D.P.S. Crime Lab and from the Sorenson Laboratory.

Together, I think we may be talking about as many as six or seven witnesses who have been identified, and as far as we know may be likely to testify, and it could be even a larger number than that. My friends are telling me that it is a much larger number than that. I have now interviewed seven. The reason I am so ignorant is this is a disclosure that was given to us this morning, I take it,

adding --

Your Honor, might I ask out loud my co-counsel a question here?

THE COURT: Yes. Go ahead.

MR. HAMMOND: I am looking at a list that adds, looks like, five people from Sorenson and a 6th person from a consulting laboratory. I can't tell from just glancing at it whether the State has removed other witnesses. If that's the case, then our list is now more like in the baker's dozen field, and which, if true, and we may file motions to preclude part of this for late disclosure, but it looks like we are now talking about a large number of witnesses who may be involved in one way or another in reporting DNA results.

We also know from prior experience in this case that there may be law enforcement personnel, who, if allowed to do so, would themselves want to report what they believe they were told in terms of what the DNA results have been, from now, a very large number of items that have been subjected to what is called STR testing, or the STR testing isolated on male DNA, known as YSTR testing. I haven't counted the total number of items that there may be testimony with respect to, but I am sure it is in excess of 25 or 30 items.

So we have an issue that will be arising

repeatedly throughout the trial and will become relevant, I suggest to you, in the first instance at opening statement in this case, and what we have argued in our motion is that this is a field that is fraught with the opportunity for confusing jurors at the best and actively misleading them at the worst.

We have seen reports and now seen interviews of people at both the D.P.S. lab and the Sorenson lab who wish to describe their results in a variety of different ways. Those descriptions vary from statements such as, I cannot exclude, or my results are inconclusive, or I was unable to make any meaningful comparisons. Those are the most common terms. And then, typically, someone on the prosecution side will take those words and will ask the next question, which is, well then, can we assume that you could not exclude Mr. DeMocker, or the next question after that, so therefore Mr. or Ms. witness, that means that Mr. DeMocker's DNA could be there, and if you had a more complete profile or more data from the crime scene, you might be able to link it to Mr. DeMocker. And some of those witnesses might agree with that; some might not.

But I think the Court as seen from the *Simpson* hearings in this case and from the Grand Jury remand hearings, how fraught with potential difficulty this area is.

While we were, Ms. Chapman and I and Mr. Paupore and Lieutenant Rhodes, in Salt Lake City on

Monday, we were treated to a new characterization that I have not heard before. One of the witnesses, whose name I now see on this list, and I don't know whether she will be allowed to testify or not, but one of the witnesses purported to tell us that she might testify that she found matches between the defendant and unknown DNA samples, because at various places she might have found several loci at which the same allele appeared in the unknown as appeared in Mr. DeMocker's known sample. And she said that it was possible that if all she had was a very small number, a very partial sample, even as little, I think she said, as little as 1 out of 14 alleles, and maybe a couple more, maybe two, maybe three, if that was all she had and if those two or three or one happened to match Mr. DeMocker, then she would feel comfortable testifying that there was a match.

And then she explained that she would go on to testify that that match only meant that Mr. DeMocker was in the same category with -- depending on her population statistics of other Caucasians -- might be in a group that might be a thousand, might be 50,000, might be 100,000. She would have to look at her population statistics charts to tell her what that match meant. But that nonetheless, she would be prepared -- and her name, Your Honor, is Miss Brown, and as I said, she is on the list. She is an analyst at Sorenson, and she would purport to tell the jury in those

circumstances there was a match. Her own view of that is that that is not misleading, because we could always ask her, well, you mean that this could have been another person in the same population of 50,000 or 100,000.

But I think from the case law and from our own experience in this case, we can all see how potentially actively misleading that kind of testimony could be, because, in fact, there are no matches. There is nothing that a reputable scientist would say is a match to anything involving Mr. DeMocker.

We did have yesterday at least one breakthrough that I think is a great example of the problem that we will have with respect to items of evidence in this case, if we don't proceed with the greatest of care on this DNA evidence. As the Court knows, for some considerable period of time, it has been the position of the State that with respect to the victim's fingernails on her left hand, that eventually a major contributor, a major donor, was profiled, that there was a complete, full, it is called a 14-point male profile, and we have known for a great long while that Mr. DeMocker is excluded from that major profile. But relatively recently, as the Court will recall, the State observed that there might be a minor unknown contributor, that is, there was some additional DNA that was exposed during the YSTR testimony that needed to be further analyzed.

And with that question in mind, the fingernails were sent up to the Sorenson Laboratory in Salt Lake City. Testing was done. Our representative, Norah Rudin, who will be a witness in this trial, was there for that testing, and we received a report. We received a report on the 14th of April.

And at that time the report said that upon examination of the minor contributor, they could exclude James Knapp, but they could not exclude Steve DeMocker, and therefore, reported that they could make no meaningful comparison. And we were advised that they intended to have a witness testify that, essentially, what that means is with respect to the fingernails on the victim's left hand, the prosecution and their witnesses would feel free to say, we cannot tell you Steve DeMocker was not there, that his DNA was not under her fingernails, which as the Court can understand is a hugely important issue. That was one of the reasons why we went to Salt Lake City to conduct these interviews.

At the end of the day yesterday, the witness who had been responsible for analyzing the DNA under the fingernails, which is only 1 of about 20 different items evaluated by that laboratory, advised us that she had made a typographical error in the report provided to the County Attorney's office and provided to us, and that typographical

error turns out to be that she switched Mr. Knapp and Mr. DeMocker. And that upon further examination after several hours of recorded interview by Ms. Chapman and myself, she now realized that she had made that typo, and she gave us a new revision to the report. That new revision says that Mr. Knapp is excluded as the major contributor under the fingernails, and that he is the person excluded as the minor contributor, and that only Mr. Knapp remains as a person as to whom no, quote-unquote, meaningful comparison can be made; therefore, not eliminating him as a possible suspect.

I provide the Court with that information that both Lieutenant Rhodes and Mr. Paupore heard the same time I did, and I now have the letter making that revision. Because to us it is -- while it is very comforting to know that that is now, less than a week before trial, their conclusion, to us it is a magnificent example of how dangerous it is to have witnesses purporting to testify about what they think the results were before they have been fully examined on the stand about the processes they went through and the analysis that they did and the protocols used both by D.P.S. and by the private laboratories. There is no substitute for going through that whole process.

And Anne tells me that I may have misspoken. What I meant to say is that Mr. Knapp has not been excluded; that Mr. DeMocker has been. If I said it the

other way, forgive me. What I wanted to make clear --

THE COURT: You are making the point --

MR. HAMMOND: They now say --

THE COURT: You are making a point quite well that people could have a slip of the lip that could be very meaningful.

MR. HAMMOND: That would be a very clever thing for me to do. I wish I was that clever.

My point is a very serious one. If we are not extremely careful, we will mislead this jury, and the opportunity actively to mislead this jury, I fear, will continue to be irresistible to the State, unless we have some very clear guidelines.

And what we have suggested here is that until we have the witnesses on the stand, the only testimony that we know we can confidently rely on is testimony that says that, after analysis, a particular known profile has been eliminated or excluded, whether that turns out to be Mr. DeMocker, who is excluded or some other witness who is excluded, or some other reference sample. Apart from that, we urge the Court to rule that there should be no other characterization of their testimony and no other counsel advocacy in front of the jury on those questions until we actually have heard the witnesses testify.

And, at least on a couple of these, Your

Honor, we will probably be asking during the course of the trial that there be some in limine hearing out of the presence of the jury with respect to the purported testimony of at least a couple of these people who still seem to be wetted to the idea that they can say that Mr. DeMocker has not been excluded.

But until we have those opportunities, our suggestion is that to avoid misleading testimony, to avoid misinforming this jury, that we have an order that DNA testimony is to be described only as to those that we know to a reasonable degree of scientific certainty to be an accurate description, and exclusion is the only accurate description that we are aware of.

Thank you.

THE COURT: Thank you.

Mr. Butner.

MR. BUTNER: Judge, I submitted a brief in response to their motion that basically refers the Court to the *Lehr* case, where the testimony was all about the inconclusivity of DNA results, and the fact that people could not be excluded, and the results were inconclusive, terms of that nature. All of that was presented to the Arizona Supreme Court, and they said the real problem with this is limiting cross-examination.

And Arizona, as the Court is well aware,

allows for wide open, broad ranging cross-examination. And I understand Mr. Hammond's argument. In fact, he did make a slip of the lip, and he also indicated that there were such dangerous remarks that could be made. And he quoted one, I quote, cannot tell you Steve DeMocker was not there.

Well, first of all, those laboratory experts can't testify about whether Steve DeMocker was there or not. That isn't anything within their field of expertise. They can testify about whether Steve DeMocker's DNA was under some fingernails or not, if there is a match. They can testify that the results are inconclusive and what that means. And they can also testify that some alleles match. That is an entirely different thing from a DNA profile matching.

I understand that the defense is very concerned about the jury being confused. You know, we all are concerned about the jury being confused. But I don't think that the way to guard against that is to narrowly limit the DNA testimony or the DNA cross-examination or anything like that, as was dealt with by the court in *Lehr*. In fact, the Arizona Supreme Court has kind of given us guidance on that, on the back side of that issue, so to speak, by saying, no, look, sure some of these things are equivocal, and that's is what they dealt with in *Lehr*. But the way to cure that is to allow for free ranging, broad ranging, cross-examination.

And also, of course, to state the obvious, you have to lay foundation for any witness's testimony. You have to make sure that they explain how they got these results, what they did, their procedures, their protocol, all of that kind of thing.

But once you have done that -- I am not going to suggest to the Court that the State is going to present evidence to this jury that somehow matching alleles, two or three, mean Mr. DeMocker did it. No. But it is not right to interfere with fact-based testimony under oath by a witness that is accurate that, sure, there are certain alleles that match. But there -- you need "X" number of alleles to come up with what we call a profile, and then declare that there is a match between the profile and the known. And that is an entirely different proposition.

They have had their expert present. They have observed the testing. I don't think that it is appropriate for the Court to limit, at this stage of the game, testimony by experts in this case in terms of fact-based opinion. And, of course, the issue then is fact based, and that is a matter of laying the proper foundation. They have to describe what a complete profile is, what a minor profile would be, and what the term "match" means in their field of expertise, whether there is a match between a known and a complete profile, or whether there is merely a

match between alleles.

I think it is inappropriate, even, that the defense suggests that the State is going to try to mislead the jury. I have never tried to do that. I would never try to do that in this case, Judge. And I think that is highly inappropriate for them to say that, oh, yeah, the prosecution is going to go ahead and do that. That is not true. That is not right. And this Court shouldn't enter some kind of order that precludes testimony by qualified experts that is fact-based testimony, and then their opinions in that regard, based upon the suggestion by counsel, that this is going to be -- this is going to invite misconduct by the State.

THE COURT: Mr. Hammond.

MR. HAMMOND: Let me address *Lehr* first, the case that Mr. Butner cited. This is an opinion authored about eight years ago by Justice Zlaket. It arose at a time when the state of the art in DNA testing was what was known as RFLP. We have now gone beyond RFLP to STR, YSTR, and we will here a little bit during the trial about mitochondrial testing of the hair that was obtained at the scene.

The Court, I think, was dealing with an issue, as Mr. Butner correctly points out, goes to the question of the right of the defendant to cross-examination witnesses, the Sixth Amendment right and the Fifth Amendment

right that goes along with the question of the cross-examination. That is a different question than the questions that typically arise under 401, 402, and 403.

When we talk about characterizing expert testimony for purposes of direct examination, particularly direct examination by the State's witnesses, we are talking about the opportunity, either intentionally or accidentally, to mislead a jury as to what the DNA means. And that issue, I think, is one that the Supreme Court has not resolved.

The finding in *Lehr*, I find this interesting, in that case that the court ultimately found that to whatever extent there might have been undue restrictions placed on the defense at trial, that it didn't really matter all that much because of all of the other evidence in the case that the court at that time thought confirmed guilt, ironically including eyewitness identification testimony, which is falling into some significant disrepute in this country since the last decade.

But I don't think that Justice Zlaket's opinion, or any opinion in Arizona, yet has addressed carefully the question of misleading a jury through the mischaracterization by the prosecution of prosecution witness testimony.

Let me deal with the point that Mr. Butner raised. It is clear that we cannot say, nor can

the prosecution say, that the absence of DNA entirely means that someone wasn't present. I think we all know that. And I wasn't intending to suggest in my remarks that anyone is precluded, except on the ground of relevancy, from saying the absence of DNA means somebody wasn't there.

But when you have DNA, what we have expressed a concern about is this: If there is DNA found on an object, whether it is the fingernails, as we talked about, or whether it is the door knob or the light bulb or the telephone, if a witness gets on the stand and says we cannot exclude Mr. DeMocker as a contributor to that DNA, which means that his DNA could be on that object or under that fingernail, that's the testimony that we believe is misleading. And it doesn't require a finding of prosecutorial misconduct to believe that the prosecutor, unless precluded, will ask those kinds of questions.

I submit that the State in this case will find it irresistible if allowed not to ask the question, so what you are telling us is that Mr. DeMocker's DNA could be on that item. You just don't have enough of a profile to be able to see it clearly yet. That is the kind of question that we think would violate the Rules of Evidence and would also offend Mr. DeMocker's constitutional rights.

Thank you.

THE COURT: Well, much scientific evidence, I

think, comes under its own microscope as a result of television shows and the like. Everybody expresses it as the CSI effect and that sort of thing.

I agree with Mr. Hammond that there are opportunities for confusion and misleading of a jury, but I agree with Mr. Butner that the best way to resolve those sorts of things is through, as described in the case law, thorough appropriate cross-examination. To the extent that a witness may say if I had a bigger sample, perhaps Mr. DeMocker's DNA could be found there, but I don't have a bigger sample, I have something that shows one or two alleles that match up allele by allele with Mr. DeMocker's, but it also matches up with 49,000 other people. I think that to bring that kind of information out to the jury, you can say the same thing about it cannot exclude many, many more people than Mr. DeMocker.

I don't disagree that the careless use of the language by either the scientists or by the counsel who are arguing the case can present significant problems of confusion to the jury, but that is why we have legal advocacy and this testing of truth through this whole process of the trial.

I think all of the testimony has to be countered in terms of reasonable scientific certainty, so I would ask that both sides, in terms of their examination and

cross-examination of various witnesses presented with regard to DNA and other scientific matters, be careful about the expression of those issues.

But I am going to deny the request to the extent that it seeks preclusion of argument until the testimony or opening statement with regard to what the witness who did the actual evaluation -- or witnesses, more correctly, who did the actual evaluation, I think that that is not an appropriate limitation on opening statement.

I fully expect the defense side to hold Mr. Butner's feet to the fire. If he gets up and argues something that doesn't turn out to be true, to then hammer him over the head for the rest of the case in doing it. Obviously, both sides can do that sort of thing with regard to the opening statements that are made, whether there is ultimately proof of that.

I trust in the system of examination, direct examination, cross-examination to bring out those sorts of things that will clarify what otherwise might be misleading testimony. I am going to deny the defense motion in connection with that request.

Next motion that either side thinks you need to get to quickly. Anything, Mr. Butner, you think that I need to hear about? Perhaps the Knapp evidence. You filed the motion with regard to keeping out evidence of Mr. Knapp's

character, behavior, proximity, reputation, those sorts of things on April 14, and I did receive a response back from the defense. Turn to one of yours.

MR. BUTNER: I did, Judge.

Basically, I filed a motion in limine because I believe that what the defense is going to try to do is, in addition to presenting facts that establish third party culpability on the part of Mr. Knapp, as they have recently set forth in their disclosure, they are going to attack the character of Mr. Knapp. Try to prove that he was a drug addicted fellow of poor moral character that very likely is somehow the person, because of that, that killed Carol Kennedy.

And that's -- first of all, that kind of evidence is not admissible in this case. It is a red herring, so to speak. It is one thing to try and establish third party culpability of Mr. Knapp in terms of, well, he was there, or he could have been there, and therefore, he could have done this crime and he doesn't really have a good alibi.

It is another thing to go at Mr. Knapp and say that, no, he was involved in illegal or prescription drug running that was illegal, and he's a drug addict, and as a result of all of that, he is the guy that killed Carol Kennedy.

And that is not appropriate in this case. That should be excluded. It is irrelevant. It is immaterial, and it is an attack on Mr. Knapp's character. And it doesn't present evidence that is relevant to the issues in this case. Doesn't present evidence that's relevant to third party culpability in this case. It simply presents evidence that Mr. Knapp, to the extent that the defense suggests, was a bad man. We can range far afield in that, presenting evidence on the other side alone. Mr. Knapp was a great guy. He loved his kids. He was a responsible member of the Embry Riddle community, and was well loved out there.

And Mr. Paupore points out to tell the judge, Knapp is dead, and he can't testify, and he can't defend himself, either. And we shouldn't be in that position. This trial shouldn't be revolving around that kind of thing, about James Knapp's character. I understand an attack on his alibi, so to speak, and that makes sense. That is fact based, that is evidence based, but an attack on Knapp's character is irrelevant and immaterial in this case.

THE COURT: Who is arguing this one? Mr. Sears.

MR. SEARS: Your Honor, let me go back a bit, if I could, to the relationship of Mr. Knapp to this case. The Court has heard a lot of testimony, and I think has

probably read a number of things about Mr. Knapp.

But at this point in the case, less than a week from trial, there are really two ways now, I think, that Mr. Knapp has something to do with this case. The State had -- and I will try to ignore the irony of the State accusing us of trying to defend Mr. DeMocker by pointing out someone else's bad character after two years of attacks on Mr. DeMocker's character as proof that he murdered Carol Kennedy.

But the State has said all along, and has said in their papers in connection with this motion that they investigated Mr. Knapp, determined he had what they now most recently call an ironclad alibi, and that it is wrong for us to fault the police for their failure to timely investigate Mr. Knapp and his circumstances, and it is wrong for us at this late date to even open our mouths and say that Mr. Knapp could be a suspect in this case.

I will tell you that I was prepared, and I actually drafted a response saying that based on our investigation and the State's investigation at this point that although we had doubts about the alibi, we were not in a position to argue seriously to the jury that Mr. Knapp had no alibi, until some recent events, and they came in two ways.

They came in the depositions -- comes in two ways, Your Honor. The depositions that I took of Ann

Saxerud and her young son, Alex, confirmed a couple of things for me, which is the first part of Mr. Knapp's alibi was that he was at the time of the murder baby-sitting his youngest son at the home of his former wife here in Prescott and was not out at the Bridle Path scene. Both the son and Miss Saxerud had been interviewed by the police in 2008 about this, and, basically, Miss Saxerud said, I saw Mr. Knapp come to the house. I left with our older son to take him to roller hockey practice. When I returned some considerable time later, he was there and he shortly left. She can place Mr. Knapp at, now she says, about six o'clock at her house, as between 8:30 and nine o'clock at her house.

The son was ten years old at the time, and he displayed a surprising clear memory. I am not really sure exactly what to make of that. But a clear memory that his dad came, they rented a movie, he remembered the title of the movie. He remembered he thought it was pretty dumb at the time. Now that he is two years older, he thinks it's more of an adult movie and he now gets it. He said he played on the computer. What he did say was that he didn't think his dad left during that period of time, but he couldn't be sure.

THE COURT: This is the same young man that the mother was seeking potentially to have him testify in a remote setting.

MR. SEARS: Yes, Your Honor. And she sat -- I had no problem with it -- his deposition was very brief. The transcript will show that. And I, of course, agreed that she could sit next to him while he testified. We did everything we could to make him comfortable. That is what he said.

So, there is a question then about whether the ironclad part of it extends to the possibility that Mr. Knapp left the home and was gone, and it really depends on the credibility of this young man and exactly what he can say about that happening.

The more particular part, though, of Mr. Knapp's alibi that the State has focused on in this motion, but also in a number of other proceedings, is a call that was made on Mr. Knapp's cell phone almost exactly at the moment when the State says the call between Carol Kennedy and her mother, Ruth Kennedy, terminated.

And the State's expert, whom I interviewed last Friday, who was working on this case and produced a report, which has still not been formally disclosed to us -- it may. We just got another disclosure today. It may be in that disclosure. He issued a report dated April 20th, last Tuesday, of his results. And what he concluded was, he was looking at this call, and he said that records indicate that that call registered off a tower here, a Sprint cell tower here in town, on Indian Hill off Country

Club Circle very near Miss Saxerud's home. His conclusion generally was -- it was very detailed and very professionally done -- but his conclusion generally was that it was likely that Mr. Knapp was in the vicinity of that tower when that call was placed. He actually checked his voice mail. It wasn't a Star 86 call. He had a system where he dialed his own number and that accessed his voice mail. And the length of the call was consistent with a number of other calls that this expert believed were Mr. Knapp over the previous 30 days checking his voice mail. He did it on a fairly regular basis. That was his conclusion.

And the State has relied upon that heavily, saying therefore, Mr. Knapp couldn't have been at Bridle Path at the time of Carol Kennedy's attack. However, during that interview, things took a slightly different turn. And this expert, who is a sergeant in the Gilbert Police Department, had a wonderful Power Point presentation showing the experiments that he did. He took about 12,000 readings in the Prescott area over several different trips, trying to show the coverage area where it would have been possible for Mr. Knapp to be with his phone and still have that call register off this tower in town.

And he described it as a moving amoeba. And, in fact, when you look at the Power Point presentation, which I bet we will get to do at trial here, it kind of looks

like a moving amoeba. He has it done in color. It is a very impressive presentation. What he said was this: He said that he was comfortable saying that Mr. Knapp's phone -- this is just Mr. Knapp's phone. There is no guarantee that Mr. Knapp was holding it at the time, but this is the allegation -- was not within a mile of the Bridle Path residence when the cell phone call was made.

He shows in his map a coverage area that extends to the intersection of Pioneer Parkway and Williamson Valley Road, which as the crow flies is about three miles; by car, it is about three-and-a-half miles from the Bridle Path residence. And we had a lot of conversation during this interview about how that phone could be used, and did it necessarily mean that Mr. Knapp was driving when he did that. Could he have pulled over. A number of things that we talked about that the sergeant agreed all were possibilities.

But then the conversation with Mr. Ray turned to the question of this timeline. We talked about phone records. We talked about what we didn't know about Ruth Kennedy's behavior on this phone, and what we didn't know about the condition of this V-tech cordless phone that was found next to Carol's body. The net effect of that is that it opens up, arguably, a window of time that changes the sequence of events, the sequence of events being the termination of the call and the placing of the cell phone

call, and without going into excruciating detail, in our view creates a scenario in which Mr. Knapp could have been the assailant and could have gotten to the car and driven rapidly towards where he was supposed to be baby-sitting his son and stopped along the way to make this call, whether it was intentionally designed to give him an alibi, or whether he was just trying to see if he had been busted during that period of time and Ms. Saxerud had come home early, whatever the circumstances were.

So, having completed that interview and completed those depositions, I took the response that I filed and tore it up and replaced it with the one that you have, which says that there is a scenario under which Mr. Knapp's ironclad alibi is not so ironclad. That is the factual basis for it. We could present hours of testimony here to establish that, that is a summary, and I think it is a fair summary, of what those witnesses said at deposition and interview.

There is a whole other matter, which Mr. Butner really didn't touch on in either his response or, actually, his arguments here today. And we have hesitated for many, many months bringing this matter to the Court's attention or placing it in the public record, because there are many things about this that are sensitive and of a concern to us, but now I think the cat is out of the bag. We

have touched upon it in our response, and I'm going to touch upon it in general terms here today.

In the Spring and Summer of 2009, we became aware of communications, first inside the jail to Mr. DeMocker, and then in an anonymous e-mail sent to me and to Mr. Butner in June of 2009, which detailed a very different and very complete version of how Carol was killed. And this anonymous e-mail was sent using a newly created g-mail account, which the Court I am sure understands, are by the very nature, anonymous and difficult to trace, was eventually determined to have been sent from an Internet cafe in north central Phoenix. It was sent to me and also sent at the same time to Mr. Butner. The address they had for Mr. Butner turned out to be wrong. It apparently bounced back to this person, and they sent me another short e-mail saying would you please pass the earlier e-mail to Mr. Butner, which is exactly what we did.

That e-mail does not suggest that Mr. Knapp was the murdered. Quite to the contrary, what it suggests was that Mr. Knapp, who by his ex-wife's own sworn testimony in her deposition, was addicted to prescription drugs, particularly pain killers and Benzoyl Diazepam. This e-mail suggests that he was involved in a prescription drug ring in Phoenix, and that essentially his involvement in that brought down a hit team that came out of Phoenix that was

originally planned to kill both him and Carol, and he wasn't there, and they killed Carol. It was multiple people. There are many, many other details that I am not going to put out in the air right now, Your Honor, for, I think, obvious reasons, but those are the circumstances.

We provided that information to the State. We made Mr. DeMocker available for a free talk, which took place in July of 2009, in which Mr. DeMocker, Mr. Robertson and I met with Mr. Butner, Mr. Randy Schmidt, an investigator in their office, and briefly investigator Jimmy Jarrell of the County Attorney's office, where Mr. DeMocker answered questions about this.

It was heavily investigated by the County Attorney's office. A very lengthy and very thorough police report was generated, was disclosed to us in this case. The report concluded that the investigation dead-ended in this e-mail and at this Internet cafe. And that they were unable to go any further, that the person who sent it accomplished at least one of their goals, which was to remain anonymous. And the same conclusion was reached with respect to these communications to Mr. DeMocker inside the jail.

Make no mistake about it, we don't play both sides of the street on this. Mr. Butner has said, including today, how upset he gets when we accuse him of improper or unethical conduct, which is not our intention

ever. But here, the evidence about Mr. Knapp is not designed to dirty him up so the jury might think he did this. To the extent that the jury hears the story about this anonymous e-mail related communications, it is relevant, I think, for them to know that Mr. Knapp had a prescription drug problem, that Mr. Knapp went to Phoenix for treatment. All of these things are well documented and well known to the State.

It is also important for the jury to know that during this relevant period of time, Mr. Knapp claimed that he was dying of cancer, a claim which he backed off of at the very end of his life. It is important for the jury to understand the circumstances of his death, which were very mysterious. The State can't seriously argue otherwise.

It is also important for the jury to understand that Mr. Knapp was desperate for money. That he approached the DeMocker children, particularly Katie, for money after her mother's death. That he was engaged in any number of what I would describe as get-rich-quick schemes. He actually fell for the Nigerian bank scam and lost money to one of those obvious and old Internet scams. Filed a report with the Prescott Police Department claiming he was a victim.

All of that is circumstantial evidence, just like the circumstantial evidence that the State wants to present against Mr. DeMocker, that supports the possibility that this anonymous e-mail is, in fact, an accurate version

of what really happened to Carol Kennedy, and it raises the question of reasonable doubt.

When you look at the case law, particularly *Gibson*, which is the principle case in recent Arizona Supreme Court jurisprudence on this. The standard of proof necessary to allow third party culpability evidence is not a great one, and the State has done much of the investigation for us on the anonymous e-mail. That is a kind third party culpability case.

The State has now provided an expert witness that, I think, helps us understand that Mr. Knapp did not have an alibi. Whether or not that evidence gets presented to the jury is not entirely clear to us at this point. There are some other determinations that need to be made that may not be made until the morning of opening statements.

But to say that this is character evidence and should be excluded, if you remember they tried to exclude it under 608, which the Court recognized was the wrong rule, didn't apply, is not what we are talking about here. We are talking about third party culpability. We have met our burden, and we will be able to present the case of third party culpability either that points to Mr. Knapp as a possible perpetrator of this crime, and/or one that points to the story told in this anonymous e-mail as being an

alternative plausible story that the State cannot argue is without foundation and made up out of thin air. There is enough to it that when the Court hears the evidence and the jury hears the evidence, it will make you think.

I will tell you that since the State realized that we might try to offer evidence of this, the State has engaged in a frenzied effort to try and discredit this anonymous e-mail, going after family members on the idea that this was a fabrication of Mr. DeMocker or his defense team or his family or his friend or a whole long list of other people. To date, we have no reason to believe that the State has uncovered anything that would suggest that and, in fact, we know that they have uncovered evidence through subpoenas that show that the people they suspect of being involved clearly were not involved. Phone records that show that those people were not anywhere near the place where this e-mail was sent.

This is part of the last ditch effort by the State, I think, to be defensive and to try and argue that if it is something that doesn't fit with their theory of the case, it must be a hoax. And if it is a hoax, it must have been perpetrated by Mr. DeMocker and his defense.

I think Mr. Knapp is still in this case, and I am a little bit surprised that I am able to stand here today and say that the idea of Mr. Knapp as the perpetrator

is still alive, but that is the reason for it. The evidence that has been adduced in the last week makes me believe there is a theory on which Mr. Knapp could be a perpetrator, and as I pointed out in my response, he had, as the State reflexively asserts against Mr. DeMocker, opportunity, means and motive to kill Carol Kennedy. It is no different than what they say about Mr. DeMocker.

So, it is very important for the defense to be able to demonstrate that the prosecution in this case and the police quickly looked away from Mr. DeMocker, and even to this date --

THE COURT: You mean Mr. Knapp?

MR. SEARS: Sorry. Mr. Knapp. You are right, Your Honor. I am sorry.

-- and will admit no theory that suggests that anyone other than Mr. DeMocker was the perpetrator, even to the point of claiming that alternate plausible theories are fabrications. That's where we are in this case.

THE COURT: Mr. Butner, it is your motion. You can have the last word.

MR. BUTNER: Thanks, Judge.

First of all, the evidence that Mr. Knapp committed this homicide is basically non-existent. In fact, there is no evidence that Mr. Knapp committed this homicide. What Mr. Sears has been talking about is a hearsay e-mail

that, apparently, had origins, according to Mr. DeMocker, in the jail, whispering in the vents of the jail, and then ultimately lead to an e-mail that was sent to Mr. Sears, and Mr. Sears was directed to get a copy of this e-mail to me. All hearsay. And all highly unreliable hearsay.

I mean, we have this anonymous e-mail. Mr. Sears is accurate. We have investigated this very thoroughly, and he is accurate that the investigation is on-going. We are still trying to find out where this -- rather not where it was sent from, but who actually sent this e-mail and where this comes from.

But what this is, is basically going back to a plan and simple pure character attack on James Knapp, a person that is deceased, not in a position to speak and defend himself, and it goes back to pure character evidence that wouldn't be admissible in any kind of a trial, either against Mr. DeMocker or against Mr. Knapp. There is no basis for this rumor-based attack on Mr. Knapp, this rumor-based e-mail. It is plain and simple irrelevant character evidence. All of it should be excluded.

The drug addiction aspect of it should be excluded. The e-mail should be excluded. The rumors in the vent should be excluded. All of that, Judge. We are not saying that they don't have the right and possibly, arguably on their part, the ability to demonstrate that Mr. Knapp

might have been able to commit this homicide. But we think they are mistaken in that regard. We think the evidence proves something entirely different. That does not give them the right to attack Mr. Knapp's character with this kind of blatant, rumor-type of evidence and character attack on Mr. James Knapp.

Talk about misleading the jury and confusing the jury. This is an effort to erect a smoke screen, so to speak, a cloud of rumor and innuendo around the character of James Knapp, and it has no place in this trial. And I ask that the Court exclude it. And basically, it is Rule 404, character evidence, generally speaking, is excluded.

THE COURT: Though I have been presented with assertions of what the evidence may be, I haven't had a hearing in regard to the specifics of what may be asked to be admitted. In general, I think discussions about alternative possible offenders is admissible under *State versus Gibson*, a 2002 case, for purposes of trying to assert third party culpability by somebody other than the accused defendant, in other words. And clearly, character assassination is -- and character evidence, generally, is not admissible.

But there are purposes for which testimony concerning opportunity and proximity, behavior of a person, and even character or reputation may become relevant

and admissible for purposes of pointing out that there are possible suspects other than the accused. And it would be a deprivation of a defendant's right to present a defense and to have his interests represented, I think, to do some broad brush granting of a motion in limine that would preclude the defendant or the defense team from asserting that someone else may have committed the offense.

Mr. Butner is correct, that character evidence, evidence of other crimes, wrongs or acts is not admissible to prove the character of the person, to show that they are a bad person or action in conformity with those aspects of character. But it is admissible for other purposes, and the rule has some suggestions of what the purposes are, but it is a suggestion of what may be included. It is not a limitation on how it can be used.

And the sorts of things that the rule talks about are opportunity, knowledge, identity of the perpetrator, things of that nature. So, in general, I think what I can say about the motion in limine at this point is I don't have sufficient evidence to grant it, and therefore, I am going to deny it. However, I think both sides are still bound by the Rules of Evidence and the admission of an out-of-court declaration for purposes of proving the truth of the matter asserted therein has obvious hearsay issues.

So to the extent there may be a

communication anonymously by e-mail that has been investigated to the point that it can be investigated and determined to have come from a particular Internet cafe in the city of Phoenix, it is apparent to me, based on what you all have told me, that at this point we don't know the authorship of that particular e-mail. To assert that -- as the e-mail purportedly does -- that this was some hit or action by some criminals engaged in substance abuse issues or distribution of illegal substances or prescription only substances, it may be that there is not sufficient information to present that to the jury. But I don't think I can make a determination of that at this point on the record that I have.

So in terms of that, I am going to deny the motion in limine pursuant to *State versus Gibson*. But I am also not saying that all of that evidence necessarily comes in in light of the other Rules of Evidence that may preclude it, the most obvious of which is the hearsay or potential hearsay objection to it, and a lack of foundation for where it came from.

So to that extent, I am denying the motion that I have before me with regard to excluding evidence related to James Knapp.

MR. BUTNER: Judge, that leaves open then without prejudice, so to speak, to the State filing a motion

to preclude this e-mail on obvious hearsay grounds, et cetera.

THE COURT: Yes. I am not ruling with regard to those sorts of things. I am only ruling with regard to what I have in front of me, which is a motion in limine to preclude for reasons stated in that motion, and that is principally on the basis of general relevancy and 404(b) considerations.

Mr. Sears.

MR. SEARS: I would simply point out that if the State was thinking this was an appropriate subject for a motion, I would just point out to the Court and the State that they have known about this e-mail for ten months.

THE COURT: You have made a record of it.

MR. SEARS: Thank you, Your Honor.

THE COURT: It is noon. I think probably everybody needs lunch. The question is when do you want to come back, given what we have still have left to argue and talk about. I would propose 1:15 or 1:30, whichever suits you.

MR. SEARS: We need a brief period of time to talk to Mr. DeMocker. If we could possibly have Mr. DeMocker brought back at 1:00 and start at 1:30.

THE COURT: That is what I will order. 1:30 is when we will resume. I will ask the detention staff to

have Mr. DeMocker back in the courtroom by no later than five after 1:00. We will have the courtroom open for you.

(Whereupon, a recess was taken at 12:00 p.m. to resume at 1:30 p.m. of the same day.)

APRIL 28, 2010
1:31 P.M.

PRETRIAL MOTIONS

THE COURT: Record reflects the presence of Mr. Butner, Mr. Paupore, Ms. Chapman, Mr. Sears, Mr. Hammond and Mr. DeMocker.

(Whereupon, a discussion was held re potential jury panel which was reported but is not contained herein.)

MR. SEARS: Your Honor, there is another matter that impacts the jury selection process that we just want to bring to your attention. It has to do with the petition for special action that the State filed that was served on us this morning, and I believe served on you. I don't know if you have had a chance to look at it.

THE COURT: Not that I have been aware of. It is news to me.

MR. SEARS: There is an indication that it was served at eleven o'clock this morning.

THE COURT: Perhaps on my staff, and they haven't shared that with me, yet.

MR. SEARS: We can provide you with a copy of it, Your Honor. We have a copy here.

It was a petition filed in the Arizona Court of Appeals seeking to overturn your sanctions order striking two of the three capital aggravators. The Court of

Appeals has already set a response date of May 10th for consideration of the petition.

And what this makes us think about is going forward on Tuesday with voir dire in this capital case and not being certain which aggravators are present in the case. To our knowledge the State did not seek a stay of these proceedings, and on the chance that the Court of Appeals grants the State's request for relief, and we are then in a different situation.

I simply put this issue out there. I don't have an answer for it. We didn't start this fire, but it is there.

THE COURT: Thank you.

Mr. Butner?

MR. BUTNER: Judge, that is not really an accurate description of the special action, but it does -- and I wasn't aware that it had been filed, yet, but now I know it has been. It does present an interesting state of affairs as to where we are at.

THE COURT: I suppose it does.

MR. SEARS: The prayer for relief is very straightforward. It is a single issue petition, Your Honor, and the prayer for relief is, as I said, it is simply, "asks that the court accept jurisdiction of the special action and vacate the sanction imposed by the responding judge," to wit;

you.

THE COURT: Given that, why don't we take up something more that may give them something more to think about.

I have motions to dismiss the last aggravating factor and a motion to dismiss the death penalty. Who wishes to take those up?

MR. SEARS: Those are Mr. Hammond's motions, Your Honor.

THE COURT: Mr. Hammond.

MR. HAMMOND: Your Honor, might I use the podium?

THE COURT: Absolutely.

MR. HAMMOND: I am not sure what order I ought to do these two in.

THE COURT: I am not sure it makes a whole lot of difference. They were both filed on the same day, so there isn't one that has a date priority over the other.

MR. HAMMOND: My DNA is on both of them.

THE COURT: Whichever you care to address first.

MR. HAMMOND: I believe I will go ahead and address the motion to dismiss, or in the alternative to dismiss the death penalty as a sanction for prosecutorial misconduct. I prefer to address that one first and then I

will address the pecuniary gain issue second.

We gave a great deal of thought to this particular motion. And we have thought about and anticipated what, at least in part, the State would say by way of response. The State argues -- and before I turn to the merits of the motion, I think I should deal with this issue. The State argues that the motion should be rejected as untimely under Rule 16(b).

I think you will recall we advised the Court that we were going to delay filing this motion to afford the executive branch an opportunity to complete deliberations that we were told were under way. The State in its response has alluded to those deliberations and has reconfirmed that it has no intention of reconsidering its position with respect to the death penalty.

We thought it was the appropriate course, given some notion of respect for the functions of the executive branch, to give that office the opportunity which it had claimed to be taking. We had been told on a couple of occasions that the County Attorney wished to continue to look at the case and particularly the outstanding work being done on the DNA in the case. And since the Sorenson laboratory had not finished its work, we were led to believe that they were waiting for that to be completed. It was completed. We advised the County Attorney that the work was completed and

that it demonstrated what we had expected it to demonstrate, which is that they have a case in which they have a full DNA profile under the fingernails of the victim, and it is clearly not Steven DeMocker.

After providing the State -- County Attorney with that advice, they did confirm to us after the 2nd of April, and indeed the end of the next week, that they were not going to reconsider their decision. We also felt that under the circumstances with this matter having occurred when it did on the 2nd of April, already well close to the date that we were going to commence the trial in this case, that taking what wound up being 17 days to look at this issue carefully was appropriate under the circumstances and that the Court in its discretion should allow the motion to be filed.

It seems to us, given all of the other things that have happened in this case, that taking a few days to carefully ponder this motion was the right thing to do. And so we did so, and those are the grounds upon which we stand on the timeliness.

The Court also raised the question that the State did not respond to, but the Court raised the question whether this motion could be heard by you or would need to be heard by Judge Brutinel or some other judge. Our view of that is that you are the appropriate judge to hear

this matter, and indeed, our concern as expressed in the motion, is that there are a number of events that occurred in connection with the State's filing of its motion to remove you as the judge in this case that were not known by Judge Brutinel and certainly not known by you. The full chronology of what happened on and before the 2nd of April, quite clearly was not fully appreciated by -- neither you nor Judge Brutinel were in a position to appreciate the chronology of events that occurred on that day.

On balance and given the ultimate focus of the State's motion to remove this Court, we believe that you are the appropriate judge to hear this. And we say so with particular reference to the emphasis ultimately given by the State, not to what happened in your chambers on March the 30th, but what we now know happened in this court on the 13th of January. And it has become apparent to us that unless we were to start over with a new judge, it would not be possible for Judge Brutinel or some other judge to pick up this motion and appreciate the background that led us to file it, which is why we brought it back to you.

And in particular, the factual chronology as it unfolded at the end of March and early April became for us a primary concern and a primary cause for the filing of our motion after the State elected to seek to remove you for cause.

The events of April 2nd are ones that I believe all of us when this case is over, whether it is over as a result of this motion or at some later date, will certainly be among the most memorable events that have occurred in this case, and I suspect one of the most memorable events in the history of this court.

When the motion was filed on the 2nd of April, we were, I think, all very surprised by the course of action taken by the County Attorney. And the way that sequence unfolded causes us to have great concern. As the Court will recall, the County Attorney first came into chambers without any advance consultation with Mr. DeMocker's attorneys and advised the Court that it wished you to recuse yourself based upon a comment that they claimed you had made on the 30th of March. All of this is, of course, on the record now in that proceeding. The Court will recall that at that time there was reference to and discussion of one and only one comment or event, and it was your off-the-record comment of several days -- of three days earlier on the 30th of March.

You inquired of counsel whether counsel recalled the conversation in the same way that the State had recounted it. Miss Chapman, who was there on the record, advised that she did not recall it the same way that the State did, but recalled it in words more similar to your

recollection. My recollection, to the extent that I had one, was similar. Mr. Sears had none. The only other person that had a recollection was Mr. Paupore.

The Court declined to grant the motion that it be removed from this case. And we then found immediately that a motion had already been drafted and an affidavit signed and executed asking that this Court be involuntarily removed on grounds of bias and on grounds of an inability to provide a fair trial.

That affidavit identifies, at least elliptically, a second event, an event that did happen on the record, an event that happened in the course of arguing death penalty motions in this case. This Court was not given an opportunity in chambers that morning to address that issue. As I said, it wasn't alluded to or identified in any way until after the Court had initially declined the Rule 10 motion.

We then went into Judge Brutinel's court and had the hearing in front of him. And, of course, this Court was only there for the portion of that hearing that involved your testimony. We have provided to the Court now a complete transcript of that hearing. And as the Court will see, the State first called Anne Chapman, again, to the stand, and asked her if she had a memory, knowing what she would say since she had already said it a few minutes earlier

in your court, but nonetheless, she answered the questions in much the same way that she had when you asked her earlier that morning.

The State then called you as a witness and began very quickly, as you can see in the transcript and I am sure recall, they began to inquire of you about a comment you made on what they thought was the 2nd of March at the end of an oral argument on death penalty motions.

At the time, of course, none of us had had an opportunity to go back and check the transcript of what they were talking about and were relying on whatever memory we could dredge up that morning. And we then have found out that, indeed, the day that they claimed to have recalled this Court making an inquiry on the record was not March the 2nd at all, but was January the 13th. We read that transcript again, and we have quoted pretty much in full the colloquy between this Court and Mr. Butner that occurred on the 13th of January, not on the 2nd of March. As we observed in the motion, it is some indication of how hasty the State was in its action here, that they had, in fact, gotten the wrong date and had apparently not gone back to check the accuracy of it.

But the colloquy itself is one that we found very troubling. Troubling in the sense that it would now be used as a ground for seeking to have this Court

removed for bias and prejudice. That colloquy, at the time it occurred on the 13th of January, was one that certainly did not, on the record, appear to strike anyone as even slightly inappropriate. Indeed, when the Court inquired whether the County Attorney's office was continuing to consider the death penalty, as I believe you recalled under oath but without the precise detail, was it's an on-going process. Mr. Butner speaking said he was glad you asked. He understood that he had an ethical and professional responsibility to continue -- his office did -- to address that issue.

If someone had told us on the 13th of January, or any day thereafter, that that colloquy would wind up being cited as one of two grounds, and as that hearing went on, probably the primary ground for arguing that this Court had exhibited a bias and an unfairness, I think we all would have been stunned. I don't believe there was a single person in the courtroom that day who had any instinct that there was anything inappropriate in the Court's inquiry. Indeed, I think everyone here thought that it was a proper inquiry to make, indeed, for the reasons that you eventually said when you were called to testify.

The oddity of this particular change in focus dominates, in many respects, our thinking about this. The State in an effort, apparently, to bolster its argument

that this Court had exhibited an inability to be fair then called Mr. Paupore to the stand, sworn, and he then was asked whether he remembered this colloquy. He said he did. He then went on to talk about it in some detail. We have given you the citations for that. And as we said in our motion, we hesitate to say to a 100-percent degree of scientific or any other certainty that Mr. Paupore was not here, but unless he was lurking somewhere in the back of the courtroom, he almost certainly was not here and was not a part of these proceedings. He made his first appearance in the case on January 29. I believe I met him on that day or a day shortly thereafter.

But I think that the record, and we have cited the record for the date upon which Mr. Paupore joined the case, I think it is reasonably clear that, in fact, Mr. Paupore was called to testify about something he had not observed. Possibly, to explain that, that might have happened because both he and Mr. Butner thought that the events they were criticizing you for occurred in March. That is what they said. They thought it was the 2nd of March, and so at that time Mr. Paupore was here, although there was not a colloquy on this topic that was anything like what the State has criticized this Court for.

And so as we put all of those pieces back together, it became evident to us that there was something

going on here that went beyond the limited purposes of Rule 10. Typically in Rule 10 proceedings, if this was done at the beginning of the case within the discretion of either side, we would have been, typically, required to execute a statement setting forth our reasons for wanting the Court to be removed. That provision doesn't apply to strikes for cause. It only requires an affidavit, and there is an affidavit here.

But we suggest that when you look at the history of what happened here, it is difficult to come to the conclusion that this motion was filed in a simple good faith effort to remove a judge who the prosecution had determined was biased. The facts simply don't support that. The one off-the-record comment is one not confirmed by anyone other than the prosecutors. In their affidavit, the State says that Ms. Chapman verified that statement. She verified nothing of the sort. Mr. Butner, as we pointed out in our papers, did not even speak to Ms. Chapman. What he did, and this is all laid out at length in that record, what Mr. Butner did was speak to me and did not get any kind of an answer that could constitute a verification, which then became quite obvious when we had the hearing. But yet, that became part of their reason for arguing that this Court was biased and prejudiced.

Our judgment, after looking at all of

this, was that there were other reasons for the very hasty decision to ask that this Court remove itself and then to ask the presiding judge to remove you. Mr. Paupore testified that several days earlier we had had oral arguments in this court at an evidentiary hearing with respect to Barbara O'non and that the rulings had been adverse to the State with respect to Miss O'non and that that had been troubling to the County Attorney's office.

Mr. Paupore also testified that the County Attorney's office was very much aware that on that very day that we were in front of Judge Brutinel on the 2nd of April, there were a large number of other motions to be argued that the State thought might be critical to their case. Motions that they did not want argued in front of you.

We said at the time, and we think now that we have looked at the chronology of this, that that was an inappropriate consideration for the County to have engaged in. Their lack of success on prior motions, or their concern about what this Court might do on pending motions, is certainly in itself no just cause for asking that any judge be removed. And those considerations then led us to what you see in our motion.

We think it is obvious that this motion was filed to intimidate the Court, to make sure that the Court would understand that when the Court rules against the

County, this kind of adverse publicity can happen. And the very thing that I am sure everyone recognized might happen, did happen. This case wound up on the front page of the local newspaper with the Court's picture and a story about an effort to remove the judge, right in the middle of the process of selecting a jury. About the most foreseeable thing that could happen as a result of a motion of this type filed when it was.

We said in our papers, and I think it to be unassailable, that it is next to impossible to know whether an effort to intimidate a judge has succeeded or not. I come from a law firm, Your Honor, that considers itself a judge factory. I don't consider that all that flattering, but apparently a lot of other people do. We have turned out a lot of judges. We have ten people who were my partners who are now either on the federal bench or the state bench. And I know that none of them, just like this Court, would say that they have been intimidated.

We have had similar questions arising in Maricopa County recently with respect to proceedings down there, and it is very, very difficult to even imagine a judge acknowledging that inappropriate actions taken by the prosecution had the effect of intimidating that judge. Indeed, I would expect this Court to say precisely the opposite, that it has not been intimidated.

But the problem is that the defendant will never know that to be certain, nor will defendant's counsel, nor will the victims in this case, nor will the witnesses in this case. When an action of this type is taken by a prosecutor, we would suggest that the question of intimidation has to be looked at as a question of whether a reasonable third party might feel intimidated and might, in fact, be discouraged from taking positions that he otherwise would have. And it is our submission and our reason for filing this motion that either consciously or subconsciously any reasonable judge who had gone through the crucible of experience that this Court went through on the 2nd of April and the days after that, would well be understood if he were intimidated in the performance of his duties.

And our client is entitled to have a judge who is not intimidated. And we are entitled to have a prosecutor who doesn't attempt to intimidate, and that is particularly true in a death penalty trial. For us to be a month from the commencement of a trial and have the prosecutor attempt to have the judge removed for cause for any reason ought to be a matter of the very greatest concern. But for the State to have attempted to remove the Court on the ground that it chose, and particularly because you asked in open court what the County might be doing about its death penalty obligations, causes us to believe that a man in

Mr. DeMocker's shoes cannot be assured that he will have a death penalty trial that will not be tainted by the conduct of the County Attorney.

And it is for that reason that we have asked this Court to strike the death penalty, or in the alternative to dismiss this case. And we are very well aware that it would take a very great moment to dismiss a death penalty case. We think this is a great moment. But at the very least, we ask for the reasons we have stated, that the Court strike the remaining aggravator in this case and cease to allow it to go forward as a death penalty case.

Thank you.

THE COURT: Mr. Butner, I read the State's response. Do you wish to add anything for the record?

MR. BUTNER: I do, Judge.

I guess it is sort of -- I filed that motion. I signed it. I signed the affidavit, because it is what I thought I heard. And I did that after I spoke with Mr. Paupore. And there was not some sort of nefarious plan or an ulterior motive or anything like that. There was simply a direct response to what I perceived to be a remark, a flip remark made by the Court, that caused me very much concern in this case.

I didn't file that as a result of what is footnoted at Page 5 of the defense motion, and how I was

trying to bootstrap going back a couple of months. I felt like that colloquy that we had a couple of months earlier was appropriate at that time. But when I put it in perspective with the Court's remark, then I was much more concerned.

And I note that Judge Brutinel -- and I don't know if you were even there at the time -- but Judge Brutinel looked at my notes, saw that I had written that remark in my notes in quotes, and made a ruling at that point in time that I had acted in good faith.

I will stand by what I did, Judge. It was not meant to intimidate you. It was, I felt, an honest effort under the Rules of Court and the law at the time. And I stand by what we did. I also stand by Judge Brutinel's ruling and finding that this Court could be a fair -- this judge could be a fair and impartial judge in this case.

And that is all I have to say.

THE COURT: Thank you.

Mr. Hammond.

MR. HAMMOND: Judge, just two quick comments.

First of all, I hope in my lifetime I never see a case in which a prosecutor moves to remove a judge for cause because he made a flip remark. If that is the standard of what constitutes an appropriate basis for filing a motion to remove a Superior Court Judge elected in this county for cause, I think there is something

fundamentally wrong here. If he really thought it was just a flip remark that caused him concern, there are hundreds of other ways for a County Attorney to address that. If that is what he wishes to call what happened in chambers in late March, it certainly calls into question -- I hope it calls into question the whole idea of filing a motion of this type.

The State also argues that Judge Brutinel somehow decided this -- you have the transcript there. The judge did say he did not find it in bad faith. He did not rule on that. The issue of whether it was done in good faith or bad faith was not one before the Court. We submit that if Judge Brutinel knew the entire chronology, which of course he couldn't know at that time, because we didn't know the entire chronology at that time, we don't think he would have made a remark in passing, as he did, that he didn't find it in bad faith.

We don't think that this issue has been resolved by Judge Brutinel, and we stand by the other statements that we have made, and particularly our concern about the chronology and about the testimony brought into Judge Brutinel's court in support of that motion.

THE COURT: Thank you.

With regard to the Rule 16.1 and the making of motions, the particular time in advance of the trial, I want the record to reflect that I was advised and

the prosecution was advised of the intention of the defendant to submit this motion, which Mr. Hammond indicates that he gave a great deal of thought to prior to filing it. I am not going to preclude the hearing of the motion. I haven't precluded the argument based on the fact that this was filed on the 19th rather than the 14th. So I will take up the issue on its own merits.

I did express some question as to whether I would be appropriate to hear the motion or not, knowing the limited amount that I did about the defense's intention to bring the motion forward. I don't think that it is inappropriate for me to hear the motion, despite my involvement in terms of the declamation of recusing and my testifying in the hearing in front of Judge Brutinel, nor do either of the parties appear to think that it is inappropriate for me to make a ruling in connection with this.

Obviously, the lawyers involved in the case from both sides recognize the significance of the penalty that the State has requested and noticed in the case, the seriousness of any first degree murder case, but more so cases in which the death penalty is requested. And I think it is probably part of that awareness by Judge Brutinel and myself that informs the court's statements, whether they were rulings or not, that regards both the original motion for

change of judge for cause filed by the State, and regards this motion to dismiss or in the alternative to dismiss the death penalty or other sanctions, like dismissing the remaining aggravator, as something that isn't undertaken lightly.

I don't have any way, nor does Judge Brutinel, as far as I know, of any way of reading into Mr. Butner's mind or Mr. Paupore's mind or any of the defense attorneys' minds what the motivation -- or what the actual motivation is or is not. When one puts on the robe, one doesn't become a mind reader or infallible, and I readily acknowledge that.

I also acknowledge the concerns that both sides may have that a judge be fair and not subject to intimidation or other effect of the filing of such motions. And frankly, I think I tried to follow those judges who have been great examples for me over the years that this is -- to be on the bench is an honor and a privilege and also a heavy burden, not to be undertaken lightly, to make sure that parties that appear in front of the court believe that they are treated with fairness and respect and dignity and fairness throughout the whole course of the process.

And that becomes an issue for somebody, obviously, in Mr. DeMocker's shoes, as to, well, is the judge now going to bend over backwards? Of course, the same is

true from the other side of the -- the other table in the room. Is the judge going to let something that happen affect his judgment with regard to making other decisions in the case? And I believe that I was even asked that when I was on the stand, and I responded as honestly as possible that it cannot. It does not and cannot affect the other decisions that are made.

So, I am going to deny -- having accepted the filing of the motion, I am going to deny the motion. I don't find a sufficient basis in the record to make any kind of finding that there was prosecutorial misconduct in the case in filing the motion. And I will assure both sides that I intend to be fair without letting any issues with regard to my personal conduct affect the conduct of the trial by way of pulling punches on rulings or otherwise not doing the same thing that I believe would be right and proper, with or without the history of filing of this particular motion.

So I am going to deny the request for sanctions, in particular to dismiss the death penalty or the other sanctions that were requested in the course of that particular motion. And my observation about the filing of a special action is; that is also within the prerogative of either side, that feels that I have made an incorrect decision in the case, to seek appellate review. That is part of the process that I respect and that I understand.

One who is on the bench, I don't think can regard a party seeking appellate level review of decisions as something that should or might be considered in any fashion in dealing with the rest of the merits of the case. So, it is something that parties have a right to do. I have had special actions take place before where I have been told I was right. I have had special actions take place where I was told I was wrong. I had many more that say we are simply not going to take jurisdiction of the issue. And the same holds true on appeals. Some I am affirmed. Some I am overturned. It is not personal, and I don't regard it as personal.

So I will continue to try to do my best to make appropriate, correct legal rulings given what the Rules of Procedure are and the Rules of Evidence are and do my job to the best of my ability as I am sworn under my oath to do.

(Whereupon, a discussion was held re potential jury panel which was reported but is not contained herein.)

THE COURT: Thank you.

Mr. Hammond, I think you probably had different arguments in connection with the motion filed the same date in connection with the remaining aggravator, apart from what you talked about already. You may proceed.

MR. HAMMOND: We do, Your Honor.

The other motion filed on the same day is the motion to strike the death penalty, and particular, the sole remaining aggravator, pecuniary gain. The reason for our motion, I believe, is clear in the paper we filed, but if we were to try to characterize what has happened here, I think that the phrase that we might use is a chaotic or unintended consequence of death penalty litigation.

What we now have, as a result of a series of events that span the last year-and-a-half, is we have had a case charged as a death penalty case with half a dozen aggravators that is now down to a single aggravator. All that is left in this case is pecuniary gain. And when we look at that case and hold up that case as the one that will now be going to trial, we ask ourselves the question that *Furman* and its progeny, the cases decided in the 1970's and now for another 30 years, command that we ask. If this happens, if we have a case that goes to trial with this being the sole aggravator, are we really able to say that we have a death penalty system that is designed to and achieves the goal of identifying the, quote-unquote, worst of the worst.

We submit that it is obvious that Mr. DeMocker, if prosecuted, convicted and sentenced to death based upon a finding that he acted with the purpose or motive of pecuniary gain, we will have a death sentence that will not reflect anything approaching the worst of the worst

offenders. We will have a system that can only be described in its ultimate result as arbitrary. An arbitrariness that as a constitutional matter that the United States Supreme Court says under the Eighth Amendment we simply cannot allow.

In looking at the history of Arizona, we think that there is more than ample support for that conclusion. As we pointed out, there are five people on death row in Arizona for whom the end result was a single pecuniary gain aggravator. And to be sure, the Arizona Supreme Court has yet to hold that a death sentence could not be premised on a single aggravator, indeed even a single pecuniary gain aggravator, but it certainly has never risen in the context in which this one has, in which we will go to trial, we will impanel a jury, and we will debate, if this man is convicted, of whether he should live or die based upon a pecuniary gain factor that has yet in the history of Arizona to result in the execution of a single person.

The cases in which pecuniary gain has been alleged are many. As we pointed out in the study that we did way back in December and January, pecuniary gain is charged often and particularly in this county. It is charged in 38-percent of the capital cases that have been charged since *Ring*. We if we get to the end of this case and this is what we have, we will have an utterly unique circumstance arise, where a man will be convicted and sentenced to death

and could die on this aggravator and this aggravator alone.

That circumstance -- and really how we got here may be of less importance than the reality that we are here. Whether some of those aggravators were eliminated for *Chronis* purposes or on *Chronis* grounds, or whether they were eliminated as sanctions, we are where we are. And what we have is a case that we think, looked at from any dimension, would not support a death sentence in a world in which we claim that we are honorably looking to identify the worst of the worst and to separate those from the rest of the homicide offenders in the State of Arizona. And obviously we are a long way from that sentence being rendered, but now it is all that is left, and we believed it was important to bring that issue to this Court today with the hope that we would all recognize that standing alone, this is not a death penalty case, and it is not the case that the prosecutor initially took to the Grand Jury, either time. It is simply not a case that has been thought of as the kind of case that this county or any other county in Arizona would want to treat as a death penalty case.

That is why we ask that the Court, based upon the Eighth Amendment of the United States Constitution to strike that final aggravator and stop this from being a death case any further.

THE COURT: Mr. Butner, I did receive your

response. Is there anything that you would like to add?

MR. BUTNER: Well, Judge, I think we accurately set forth the state of the law in Arizona in that one aggravator is all that is necessary for a jury to find that the death penalty would be appropriate.

And we will rely upon that.

Thank you.

THE COURT: Obviously, it may still be an issue in the case with regard to the other decisions that were previously made that may be up on special action, but given what the current status is of the case and the status is of the case law, I am going to deny the defense motion to dismiss that particular aggravator based on *Hoskins* and the statute, and the fact that I recognize that one aggravator is sufficient, and the defense has indicated that one aggravator is sufficient as an aggravator to implicate the death penalty, and that it be, of course, presented to the jurors that makes the ultimate decision on whether there is an aggravating factor, whether there are mitigating circumstances. I recognize the whole system doesn't end at that point, even if there is a decision with that as the ultimate outcome from the jury, it is something that is automatically reviewed by the Supreme Court.

So I am going to deny that motion.

I had the, I think, a 702-style motion

with regard to shoe prints that we haven't taken up yet, or had the defense motion that was filed certainly before the 14th of April with regard to the State making arguments about heinousness or brutality of the cause of death in the case.

I have motions to preclude that are still pending. So what order -- and I don't know, are there any other State's motions that I haven't covered?

MR. BUTNER: There aren't, Judge.

THE COURT: So, Mr. Sears, whatever one you want to take up next.

MR. SEARS: I think the motion regarding the absence of the F-6 aggravator and especially cruel and depraved evidence is relatively straightforward, and maybe we could take that next.

THE COURT: Go ahead. Is this Mr. Hammond's?

MR. SEARS: No. This is mine.

As we are doing this, I would point out that I was in a firm that was a judge factory, too. 50-percent of the partners of that firm became judges in this county. I will call that to everybody's attention.

THE COURT: I understand that the soon to be retiring judge was part of that firm, as well.

MR. SEARS: I think that will end the run of judges out of that firm. I have been told not to waste my postage many times for the application.

Judge, this motion was filed, again, largely in response to your sanctions order striking the two of the three remaining aggravators, and particularly the F-6 aggravator, which had been previously reduced to allegations that the murder had been committed in an especially cruel or depraved manner. The State had withdrawn any claim that it was a heinous crime.

It was intended, to a certain extent, that like the hearsay motion that we filed that you have heard and ruled on previously, that rather than picking out specific evidence that we would ask you to preclude going to trial, that it would be a place at pretrial where we would talk about and reflect upon and hopefully understand the Court's thinking about going forward, what would happen to the State's proof in the absence of that aggravator.

And unfortunately, my sense of the State's response is that they missed the point of my motion, and that they have launched into what has now become a fairly stock recitation of their case in chief. What is unfortunate from -- this is at the bottom of Page 3 of their response and again in the conclusion -- they circle back to an idea that this Court put to rest many, many months ago, which is the allegation that this type of evidence, being that it was overkill or rage, tends to indicate that the victim and her attacker knew each other. And in conclusion they repeat the

same idea: The evidence indicates that she and her attacker were known to each other.

This Court in remanding the matter for a new finding of probable cause, took particular note of this allegation at the time it was made and found that it had absolutely no support in the record that the State had not advanced any evidence for that proposition. We had argued that even if the State had advanced evidence that it was such a spurious notion that all the Court would have to do is think of other cases in which people were killed violently by strangers to know that that was not something that the State should be permitted to argue.

The State then, more recently, tried to promote a former FBI profiler, Mr. Cooper, to come in and testify about a lot of such ideas, including in general terms, this idea. The Court has precluded his testimony. That doesn't seem to stop the State, and is really illustrative of the problem that we saw and the reason we filed this motion, was that unrestrained, the State seems to forget or ignore this Court's prior rulings on many of these points and sees no reason to think about those things when filing pleadings on this very point, to go back and reallege ideas that have been clearly and unequivocally taken out of this case.

And that makes us even more concerned, in

some ways than before we filed this motion, that unless this Court is clearly mistaken now, the State will put on Dr. Keen and perhaps Dr. Fulginiti and other witnesses to go beyond the description of the method and manner of Carol Kennedy's death, which is part of their required proof in this case, and get into overkill and rage and pain and the infliction of unnecessary pain and cruelty and other similar circumstances.

And this response doesn't give us much comfort that the State has taken your ruling on F-6 to heart in any meaningful way. We think that what it does, instead, is to show that the State wants to take this evidence, which has a place in the trial, which has a forensic role to play in this trial, and to elevate it using graphic evidence, highly inflammatory testimony, and topics which this Court has previously ruled in a number of different ways are outside the permissible scope of the evidence in this case in an effort to inflame the jury to a particular result.

There is no doubt that this was a gruesome and horrible murder. We know that. We also know that Mr. DeMocker was not there and didn't do it. And we can't help the fact that Carol Kennedy died in such a horrible and miserable way.

But we can do what we have done, and we will not stand by idly while the State attempts to put Mr. DeMocker in the role of the person that inflicted these

things and to use this kind of inflammatory and prejudicial language. It violates Rule 403 because now the probative value of this kind of evidence, beyond the recitation of medical evidence to prove the method and manner of death, clearly has the intended effect, if it is allowed in by this Court, to prejudice the jury for no probative value. There is no longer any fact of which such evidence is probative based on your ruling, not only your ruling striking F-6, but also your prior rulings regarding these allegations of behavioral conduct on the part of Mr. DeMocker.

So, I am very glad we brought this motion. And the State's response makes me gladder still that we are here today to talk about this before we go into this case. Because if this is a foreshadowing of the State's opening statement in this case, then there is a very big problem here that needs to be addressed now. What the State wants to tell you and what the State really wants to tell the jury in this case goes way beyond the proof necessary to meet their burden in this case and takes us directly into areas precluded by the Court, no longer relevant, and certainly prejudicial under Rule 403.

THE COURT: Mr. Paupore or Mr. Butner?

MR. BUTNER: Judge, proof as to how a homicide is committed is always relevant, and it is relevant in this case, just like it was relevant in this case before the Court

struck the cruel and depraved F-6 aggravator. It tends to demonstrate, of course, that this crime was not an accident, that there was intent involved, and in some instances it demonstrates motive and it also demonstrates, sometimes by way of argument, it demonstrates that the victim knew her attacker.

And I am not suggesting that that is going to be part of the State's opening statement. That is argument. But I am suggesting that it is going to be part of the State's case in chief, the proof in this case as to how this homicide occurred. It was a savage beating where she was beaten all the way around her head, in addition to the other blows that were struck on her person. And that's the kind of evidence that a jury is entitled to hear in this case.

And to try and exclude that type of evidence is contrary to the law. That kind of evidence is relevant and probative to a number of issues in this case. And I would ask that the Court deny the motion.

THE COURT: Mr. Sears.

MR. SEARS: Your Honor, what it would have been relevant or probative to, in a limited way, would have been whether or not this murder was especially cruel or depraved. What it is not relevant or probative to is the manner and method of death in this case. That is a matter of

medical testimony.

I think the Court will well recall the testimony of Dr. Keen in the *Chronis* hearing when he talked at length about the pain and suffering and whether the victim would have been conscious during various blows. That is not relevant or probative of any fact that the State now needs to prove in this case. It is simply an attempt to adduce evidence of cruelty or depravity in a case where cruelty and depravity are not at issue any longer in this case. And I would submit that the State still doesn't grasp the consequence of the Court's ruling.

It is not permissible argument ever to argue anything for which there is no support in the record and no support in the evidence if the record and the evidence in the case does not produce evidence for the jury to consider this kind of a killing indicates that the parties knew each other, it is utterly improper, I would suggest, for the State to then expect be able to argue that in its closing remark. And I promise an objection if the State does that, and I think that objection, because the State is on notice now, might be coupled with a motion.

And that is an example, I think, Your Honor, of the degree to which the State wants to take the posity of evidence that it does have in this case and amplify it and exaggerate it in an attempt to persuade this jury to a

point of view that the rest of the evidence would not support. That is our concern, that is why we filed this motion. And now having heard in writing and in person from the State, I am even more concerned that unless this Court makes it clear that that kind of testimony is not to be permitted. The State not only plans to do it, they think they are justified in doing it.

And I think they are just wrong on the law, and they are wrong with respect to the context of this case and the Court's prior rulings. That seems not to have slowed them down much. I would ask the Court to put the brakes on for it.

Thank you.

THE COURT: I guess in terms of the particular aggravator, the State knows that evidence in support of that aggravator would not be necessary or admissible, but there are -- I guess I am concerned about the breadth of the motion itself.

I am going to deny the motion with regard to precluding the State from, in its opening statement, talking about the force of the blow, or if they righteously believe that they have evidence that support that comment in the opening statement, of what they anticipate the evidence to reveal.

Similarly, in terms of restrictions on

what Dr. Keen or Dr. Fulginiti may say with regard to their expert opinion based on their realm of science in their respective roles, I think that we may well receive opinions through the course of the testimony that is presented that talk about the force of the blows and what order they came in and the effect of such blows medically, or in terms of physical anthropology on the cranium and the skull and the brain. So I am going to deny the motion with respect to proving those things.

You get into, I think, a more questionable area trying to assert some conclusion based on the number and force of the blows into the perpetrator, and you get into a realm, I think, there of speculation that may not be able to be supported to a reasonable degree of scientific certainty with regard to the opining person that you are asking for such an opinion. And I am not sure that anyone would be qualified to bring out that kind of testimony.

I have noted before the issues that I have had and the issues that the case law has had with regard to trying to give judgments from somebody in a psychologist or psychiatrist position about what is going through somebody's head, doing a so-called forensic autopsy in some of the case law that pertain to that issue. And I think Dr. Bentheim, back in the day, was rendering such opinions.

And I think you get into similar areas of concern about what scientific basis accepted in the relevant scientific community there might be for making conclusions about relationships.

So I am going to listen carefully to the evidence. I don't know that I can issue a ruling at this point that would completely bar that kind of testimony, but it seems to me that there would have to be some good foundation laid for it that would allow some expert to make a claim of reasonable scientific certainty with regard to those sorts of opinions. And I have already spoken of the testimony previously in other motion hearing dates that we have had concerning that kind of evidence and the foundation that is necessary for that type of opinion. I have real trouble, real issues with that.

However, that is not to say that the manner of death of Carol Kennedy should somehow be ignored or sanitized or made other than what it is. That doesn't necessarily go to who committed the offense, and I don't know that there is any real dispute in terms of manner of death from either side of the case. I think it has more to do with what conclusions might be reached by lay or expert witnesses and what arguments may be made based upon that. But motive is relevant. The manner of death is relevant.

I am not inclined, nor am I going to

order, precluding the State from bringing forth evidence of the observations by Dr. Keen in the autopsy or by Dr. Fulginiti in her examination and evaluation, or descriptions of what was found in terms of her physical condition and physical condition of the house at the time of the -- of her death.

So, I am not sure that that means I am granting this in part and denying it in part, Mr. Sears, with regard to the defense motion to exclude. But I think that fair argument -- that you are correct, and I don't think the State had any dispute with that, that you are correct that argument has to be based on evidence and on reasonable implications, inferences drawn from the evidence that has been admitted.

To the extent that it is not, I will sustain an objection and consider any other motions that you make in that regard. To the extent that it is within fair inference, I probably would deny the motion and or the objection. But I don't know that I can at this point say more than what I have about the issue. I think it -- that the point which it goes toward any more is no longer, at least as long as the Court of Appeals doesn't overrule my previous decisions, the relevance for purposes of proving this particular potential aggravating factor may not be there. But the other purposes to be made of the evidence and

testimony are still relevant purposes for a description of the cause of death and manner of death.

And so, I am denying the motion in connection with that, and I think fair argument can be made or reference descriptively to what occurred can properly be made in opening statements, as well.

Do I need to be more clear? Is there some issue that specifically you need to have me address for clarity sake?

MR. SEARS: Your Honor, what I was thinking of in particular was the testimony at the *Chronis* hearing of Dr. Keen about pain and consciousness of suffering and the defensive wounds. And our view, as we just argued, was that that can no longer be relevant in view of your ruling. And to the extent the State wanted to offer it for some other purpose, it had to be subjected to a 401, 402, 403 analysis. And our position would be in the absence of an F-6 aggravator in a capital case, 403 trumps any other possible basis for it. So I would call particular attention to that part of Dr. Keen's testimony where he goes beyond a medical description of the blows. By the way, about which I think there will be considerable debate between the experts, you can anticipate that, about the number and nature of these blows, how they were inflicted. But Dr. Keen was their cruelty witness at the *Chronis* hearing, and he testified at

great length about the matters that the case law described as being supportive of F-6, which were gratuitous violence, needless infliction of pain and suffering. Those matters are no longer a part of the case.

THE COURT: In terms of consciousness or loss of consciousness, I suppose there are issues that that can pertain to such as whether Miss Kennedy was capable of pulling down the bookcase or things like that that there may be some relevance to. I guess I am not going to speculate on what possible relevance each and every part of his testimony should have. But in terms of some of the other things, I tend to agree with you.

Mr. Butner, you stood and wanted to be recognized.

MR. BUTNER: I do, Judge, because it may be that those factors were relevant in terms of cruelty and allegations of that sort, but those kinds of facts are also relevant as to how this homicide occurred. The victim's position in the homicide scene, whether she was fighting off her attacker with defensive wounds and things of that nature, how she received those wounds, all of those things are very important in proving how this homicide occurred. And similarly, with the number and force of the blows. Those things are very important also.

They don't just go to the F-6 aggravator.

They go to the manner in which this homicide occurred, whether it was an accident, whether there was intent. Those are obvious things, and yet, these are the kinds of pieces of evidence that prove that stuff.

THE COURT: Mr. Sears.

MR. SEARS: And I would not dispute the base of that argument to the extent that if the State has a theory to advance about positioning of the body, the way in which the blows were inflicted, would that be relevant. If it is admissible and if they have witnesses that can say those things, that is one issue. But Dr. Keen really came down to this point: He came down to saying if she was conscious, then for any of the blows -- and they were painful, even the blows to her arms, if she was unconscious then the number of subsequent blows were gratuitous and this was depraved. That was the teeter-totter that was created.

THE COURT: I don't think he can get to the last part of your comment, as far as gratuitous or not gratuitous, and I don't think Mr. Butner was suggesting that.

MR. BUTNER: That is true.

THE COURT: That is true?

MR. BUTNER: That is true, Judge. I was not suggesting that.

THE COURT: So I think -- recognizing that what we had at the *Chronis* hearing was different than what,

necessarily, we would have at the trial, given what the status quo is of the aggravating factors, I think that some of those sorts of comments would be off-base, and I think Mr. Butner recognizes that.

MR. BUTNER: I am not going to ask Dr. Keen to make a value judgment as to whether those blows were cruel or depraved. That is not what I am looking for.

THE COURT: Or gratuitous?

MR. BUTNER: Or gratuitous violence. Was that gratuitous violence, Dr. Keen? No, I will not be asking those questions.

MR. SEARS: Let's look at what the State said in writing in response to my motion. On Page 3, the sentence immediately before the sentence that I pointed out earlier --

THE COURT: Let me catch up to you. Okay.

MR. SEARS: "It is obviously an example of overkill in the sense that the beating to the victim's skull was significantly more than what was necessary to kill her." I would suggest with all due deference that that is exactly what we are talking about here. And in talking about a beat down and overkill that is, without using the word "gratuitous," a complete description of gratuitous violence. It is exactly the same thought expressed in a slightly different way. And it comes in the State's response to my suggestion that the rulings of the Court take those matters

out. The State felt compelled to put that sentence in their response.

I would say, again, that it demonstrates the State's lack of appreciation of the consequences of your ruling and their intention to get those factors in front of the jury for the purposes I previously described, which we said are inappropriate and contrary to the law and your rulings in this case.

It is one thing to describe the case and the medical evidence in great detail. And I think their hyperbole in here about reducing her skull to rubble and some of those things are objectionable and would be subject to objections at trial. But the general proposition describing this as a beat down and overkill is precisely what the striking of the F-6 aggravator, as least in our view, is taking out of this case. That very sentence comes from them, not from us.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, this -- Dr. Keen's testimony indicated that the victim could have been dead basically after the second blow to her head in this case, if the Court will recall, at least that is my recollection of what he testified to. He also testified that there were more blows inflicted than was necessary to kill her.

I am not offering that kind of evidence

to demonstrate that there was gratuitous violence in this case. What I am doing is offering that kind of evidence to demonstrate that this wasn't an accident, that there was intent here, intent by the killer to kill her, that there was a motivation for this killing. I would suggest by way of argument, personal in nature. And similarly, I have heard the defense suggest in this case that this was a rage killing. And I have also heard it called a domestic violence offense by the defense, even as recently as today.

The long and the short of it being that all of that kind of evidence, and I am not talking about judgments of value, judgments like it was cruel and depraved, but this kind of evidence demonstrates what type of crime it was, the motive, the intent, the absence of it being an accident or mistake, all of that, and it is highly relevant in that regard. And I think it is appropriate that the State be allowed to use that kind of evidence. And at the time of argument to also be able to make that kind of statement, just as if the defense were to make the statement that this was a killing out of rage, that somebody snapped and made that kind of an action and killed her.

THE COURT: It is your motion, Mr. Sears. I will give you the last word.

MR. SEARS: Thank you, Your Honor.

What we have said, to be clear, about

rage killing has always been in response to what was, until your last set of rulings, a great anomaly in the State's theory. They had alleged that it was cold and calculated, and then they have described this brutal beat down. And we have tried to point out, and eventually we did point out, and you removed the cold and calculating aggravator, the impossibility of that concept, that it was carefully planned in a dispassionate way to be undetectable and then committed in a brutal and totally different way than the planning in this case.

We don't know what happened in that room. Mr. DeMocker wasn't there. He doesn't know what happened. We know what the medical evidence is. We know what the result was. Why the attacker or the attackers did this, what their state of mind was, what they were trying to do, what any of this means remains a mystery and should be a mystery to everybody in this case, and it is certainly a mystery to Mr. DeMocker and those of us on his team.

We have not said that we know it is a rage killing. We have not said anything of the sort. When we used that description, it has always been in the context of trying to point out the impossibility of the State's alternative theories in the case. Now with the cold and calculating aggravator removed, it may be that the State will advance some theory that Mr. DeMocker went over -- and in

fact, discovery has indicated from interviews that we have done, that that is one police theory in this case. That Mr. DeMocker went over to Carol's house to collect money and something happened and as a result she was killed. That is very different than the lying in wait, intentional premeditated theory that they have advanced, and it is very different than this wild rage crime, and it is way different than the coldly and calculated, planned, undetectable scientific theory that they have advanced primarily through these computer searches.

I just want the record to be clear, Your Honor, that the idea this is a rage killing is not one that came from the defense. It is not one that we advanced. We don't know, and we are going to tell the jury we don't know what happened in this case, other than the obvious physical outcome. But we can't say anything about why Carol was killed or what was in the state of mind of the person that did it.

THE COURT: Well, I would be prepared to sustain objections that were made to speculation about the meaning of this, unless it is coming from somebody who had a scientific basis for rendering an opinion that is acceptable under the rules and it was disclosed appropriately.

But I am, frankly, not prepared to grant a motion in limine in advance of the trial, not knowing what

the evidence is, that would limit the argument that the State may make with regard to the nature of the killing and what the evidence has shown in connection with that. And that may involve some characterization of the evidence.

But argument may include reasonable inferences drawn from the evidence. I think as to that point, I am going to have to wait and see, and see if there are any objections to the comments that are made. But having heard from Mr. Butner, that he does not intend to bring out that kind of information of gratuitous characterization and that sort of thing through Dr. Keen or other witnesses having to do with the physical scene, I accept that and I think that is in keeping with what I would rule in connection with the fact -- in connection with this motion in limine, and the fact that that particular aggravator is not on the table currently.

All right. It is about ten after 3:00. Probably a good time to take another break for everybody. So let's resume at 25 after. That is about 13 or 14 minutes.

(Brief recess.)

THE COURT: Record reflects the presence of the defendant and all three of his counsel and his investigator, prosecution.

And Mr. Sears.

MR. SEARS: Judge, we had -- you had directed

the parties to file simultaneous memoranda on the question of whether and under what circumstances the courtroom could be closed during individual voir dire in this case. And both sides have now provided you with that. We provided ours and the State has handed us their response just now. And because this appears to be the last time we will be together before Tuesday morning, I think it is very important to take this matter up now.

THE COURT: I agree.

MR. SEARS: If I could be heard briefly on that.

We provided you, Your Honor, with authority from a number of different cases. We are of the assumption that the Court has already decided that we are going to have individual voir dire. And the question now is can that voir dire be conducted in a closed courtroom. We think that if you distill from the cases we have given you and swing those by the *Bible* case in Arizona, that there is a procedure by which this can happen. It requires the Court to have a hearing, but this could be the hearing right now, and make particular findings to do the things that we are asking you to do.

Among the things that I think would mitigate in favor of a closed courtroom, in addition to the issues that we raised on Page 4 of our motion regarding the

capital voir dire, *Lockett* and the other cases, *Penry* and the other cases we cited about the chilling effect of having to talk about such personal matters, there are some really practical considerations in this room. The proximity of counsel table to the public. The inability of the jurors to really have much privacy inside this courtroom, so that they would feel comfortable talking about these personal matters. The impossibility of bench conferences, particularly bench conferences where the defendant would exercise his right to be present, which does exist in this case. And the constant shuffling back and forth into chambers and out of chambers and the delay that that would occasion in the process.

In addition, we have pointed out to you that there was some unfortunate press coverage. The type of coverage was not only unfortunate, the timing of it was very unfortunate. That had pictures. We have already talked today about the picture of you on Easter Sunday in the paper, which was on the middle weekend between the weeks the jurors came in to fill out the questionnaire. There was also a picture that ran of a scuba diving team diving into a water hazard at the Hassayampa Golf Course looking for evidence in this case that came out.

So the potential press coverage of the voir dire process is really antithetical, we think, to the concerns that we have raised about the sensitive nature and

the need for privacy and candor among the jurors. Because that is really what suffers in the end is that we wind up with jurors who are unable to give candid and honest answers. This Court has done great things thus far in moving us towards a process that would ensure all of these kinds of things for the jurors. This is what we think is the last piece of it.

There is no law that prohibits doing this. There is no clear case authority that says it cannot be done. There is no clear case authority that says the First Amendment trumps all other considerations. We think that it is a process that has to be considered. If you remember, we had one juror come in to try and explain why she disregarded the Court's admonitions, and one of the many things that she said that was odd and puzzling to us was her statement that she needed to do this to protect herself. We weren't ever quite clear what she needed to be protected from. That would be an example, Your Honor, of the potential fear level among jurors.

Whatever we think we can do in the process to protect the rights of Mr. DeMocker and balance them against the need for First Amendment protections can be resolved by the release of transcripts, which is something that we proposed in this case and has been done in other jurisdictions with good success. You need to make findings

about the effect of adverse publicity, the length of time, the facilities difficulties, and that would -- appropriate findings would meet your burden under the law.

The *Bible* case contemplates such proceedings within the discretion of the Court. That is the Arizona authority that, I think, the Court was looking for. We have given you authority from other jurisdictions. The Richmond newspaper case that we cited to you is, I think, a very thorough discussion of a balancing test between the First Amendment rights, the right to fair trial, and a fair and impartial jury, with the individual considerations of the death penalty and the implications of Mr. DeMocker's due process rights and his rights under the Eighth Amendment in this case. If we had to point to one case, that would be the one.

The rock bottom jurisprudence on death penalty jury selection, *Morgan*, *Witherspoon*, all talk about the sensitive nature of the capital jury qualification process. And then when you overlay that jurisprudence on all the other cases that we pointed you to, we think this can be done. More importantly, we think it should be done in this case. There are logistical and practical reasons, and there are reasons that go beyond the mere space and time requirements that implicate Mr. DeMocker's right to be tried by a fair and impartial jury, about whom we know as much as

we possibly can in a short period of time.

That is the position that we are advancing in this case. We think the Court could make those findings and can make them today in an appropriate way. There is ample evidence on each of the points we have raised.

THE COURT: Mr. Paupore, I did receive the State's motion with regard to this, as well.

MR. PAUPORE: Yes, Your Honor.

If I understand the proposition that the defense is asking this Court to do, we would have a juror, single juror, in this courtroom which would be closed for the individual voir dire. And then we go through that process with everybody. And when it is completed, we would have seated somewhere between 18 or 20, or whatever the number that is decided upon as far as alternatives.

What I don't -- if we go through that process, there is one concern that I have which arises at every trial, albeit this is a capital case, it would still arise in this case. What do we do with the 18 to 20 jurors that have been screened and processed, if you will, and are impaneled in the jury for the first time when they see everybody on the panel? And then the question always comes up in the selection of a jury trial is: Do you know anybody else on this panel?

This process isolates each individual

juror from that process. There is no way to really know. You can't ask these sequestered individual jurors if you know anyone else on the panel because they won't know who the panel is until it is already picked. That is a problem in my eyes.

The Court -- I think Mr. Sears is correct, the law is kind of -- it supports both positions, either open or close the courtroom, and really I think it falls upon the solemn discretion of the Court to make the decision. I would ask the Court if, in making this decision, the State cited *State versus Canez*, it is a 2002 Arizona Supreme Court case, and individual sequestration arises in almost every Arizona capital case. So the balancing to determine whether to close the courtroom, the judge must make specific determination that closure is necessary, and that determination must satisfactory four requirements.

And the first requirement is a party seeking to close the hearing must advance an overriding interest that is likely -- that is likely to be prejudiced. The closure must be no broader than necessary to protect that interest. The trial court must consider reasonable alternatives to closing the proceedings.

And then Mr. Sears had indicated specific findings of fact are necessary in order to support the closure. And I don't believe that this case -- it is a

capital murder case, but I do not believe this case has issues of such particular sensitivity that it couldn't be conducted in a mini-panel situation.

As we have tossed around here previously, if we had eight jurors in the morning and eight jurors in the afternoon, that is one way of doing it where we would discuss the voir dire in the group. It still really does not get to the initial issue that I brought up, is whether they know or are related or know anyone else on the panel. Because the admonition is pretty strong. Don't talk to anybody. Don't think about this case. Don't watch anything, or you are going be in trouble. We know they don't always follow that to the letter. But when they get to this process, the formality takes on a new meaning. And I believe the jurors will follow the admonition. So we are not going to know some very crucial facts of this panel after it's too late.

And for that reason, the State is opposed to individual sequestration of the jurors. The issue of whether or not the courtroom should be closed impacts First Amendment freedom of press issues, and I think the Court is very well aware of the ramifications in that regard, this being a public courthouse and a public trial.

I think we need to look and try and find some halfway measure, some different measure than the one extreme, individual sequestered voir dire and completely open

panel. We have to get a balance, and I am certainly open to suggestions on how that can be done.

THE COURT: Thank you.

Mr. Sears.

MR. SEARS: Thank you.

Judge, I think we had sometime ago passed that stop on the way, and I think our impression from many things, including the list, the seating chart provided today, that the Court has agreed that individual voir dire makes sense. The question -- the only question remaining was could that or should be that conducted in a closed courtroom. If I am mistaken, this would probably be a good time to point it out to me. I think that is where we are. So the discussion by Mr. Paupore for a group voir dire, I think, is past due.

Am I right in that assumption, Your Honor?

THE COURT: Yes.

MR. SEARS: Thank you.

THE COURT: Doesn't mean I won't revisit it, if it seems like we are going way too slowly.

MR. SEARS: Again, Your Honor, we had proposed what we thought was a comprehensive plan to go more quickly. Things have happened that may change that. If we go slow, there may be other reasons, other than the fact that we are doing it individually. It may be a function of who it is

that is coming in to talk to us much more than the process.

I think that the question that Mr. Paupore raises about jurors not knowing each other is similar to the discussion we had when we were last together about witnesses. We had talked about and, I think, come pretty close to agreement, the best way to do that rather than reading a list of 200 witnesses to the jurors, would be to give them a list of the witnesses. And I see no particular reason why we couldn't also give them a list of jurors to look at, and then ask them whether they know, when they are here in groups of eight, whether they know anybody on either the witness list or the juror list. The Court can inquire of those people about that, or do it individually. That is a pretty efficient way to do it. If we go much faster, if we had eight people sitting in the box and somebody stood up and read them 300 names, as long as we are not going to have a plenary session with 315 jurors, there has to be some different approach taken to asking the jurors whether they know anybody else.

I agree with Mr. Paupore, the idea that it is too late to do that after we have gone through strikes and have a panel ready to be seated, it would be a shame to wait until then to ask the question. But I think it is pretty easily addressed with lists, and that can be done pretty quickly. We have the witness list available, and the

jury list could be provided by the jury commissioner. So that would be my proposal.

I do think that it may be required under the case law, not under Arizona case law directly, but under the case law taken as a whole, that this hearing be done with notice to the press and public and an opportunity for them to object. And I think out of an abundance of caution, so we don't have some last minute objection from the media, perhaps, for the right to cover that could derail the process. If we could do that pretty shortly, and do it in sort of a -- it might even be possible to do it in an order to show cause. Enter an order and say objections, if any, shall be filed by such-and-such a date. If no objections are received, proceed accordingly. If objections are received, try to deal with them as quickly as possible.

Although we will be -- parts of our team will be traveling, others will remain behind and could be available by phone or in person, if necessary, for a hearing. But that would be our proposal in this case. But we think there are many, many good reasons to do it this way. And we think the potential for undoing all the good that we are trying to do with the individual process outweighs any other consideration.

If you look at a lot of the cases, Your Honor, those were all cases in which the courtrooms were

closed over the objection of the defendant. That is not the case here. We aren't dealing with a defendant who has vigorously asserted his First Amendment rights. We are dealing with a defendant who wants a fair trial from an impartial jury.

MR. PAUPORE: Your Honor, I just wanted to clarify something. I addressed the issue of the individual voir dire because 11 pages of their motion address that part of it. So I would caution to touch on that subject again. I thought we were here on the closure of the courtroom, too.

THE COURT: That was the major issue, I think, that was on the table today.

MR. PAUPORE: It really was, in my mind. They had so much verbiage here, I felt I better say something.

THE COURT: I have, as I say, crossed the bridge of at least starting out with the idea of doing the individual voir dire and having a limited number of people coming in, so that there is not prejudice to a large group of the ones who filled out the questionnaire. And then any prejudice resulting from somebody's answer or opinions expressed would be minimized here, if they are the only ones being questioned. Not going to be any effect on other folks, with the possible exception of something getting into the press, and the jurors disregarding the previously given admonition to not read information with regard to the case.

Having crossed those issues already, I am not prepared to shut the jury selection process from coverage by the media. If it appears on the basis of matters reported that it is causing issues, I may go back and reconsider that also. But I don't believe that's likely to happen, in all candor. And I do think that the public, the defendant, the media and the prosecution is entitled to a open, transparent process in this and in other cases.

I don't find that closure is necessary to protect Mr. DeMocker's fair trial rights. I don't find that there is an overriding interest that would likely result in prejudice, if we have voir dire when the media may be present in the courtroom. I am not saying that the answers that we get might not be impacted in some way, if there is a recognition on the part of an individual juror panelist that the media is present. I don't know how I can make that assessment. But how they are going to know, with all due respect to our friends in the media, how they are going to know that any individual person sitting in the back is a member of the media or member of the County Attorney's staff or part of the investigation team by the defense, I don't see how that would take place.

Mr. Sears.

MR. SEARS: Judge, a couple of thoughts.

In our motion we asked that if you were

not inclined, as you are, to close the courtroom, that you would at least consider prohibiting still and video photography during the jury selection process. I am not sure that anyone was intending to do that.

THE COURT: I have been told that nobody is intending to do that.

MR. PAUPORE: Your Honor, I would add that I do believe that the individual juror's names should not be allowed to be -- I think we should address them by numbers. They have a right to their privacy, also.

THE COURT: I don't disagree with that. I think we can do something along those lines that would protect their individual identity from being revealed in the media, or see if the media would consent to that. But I think referring to the person by initials or sir or ma'am, as the case may be, would be appropriate as distinguished from having their identity be revealed in open court.

MR. PAUPORE: Another question for the Court.

THE COURT: Go ahead.

MR. PAUPORE: I am trying to visualize this. On Tuesday morning are we going to bring in the first eight candidates and then talk to them as a group or just take them one at a time?

THE COURT: I believe that we will take them one at a time, that I will have them in the jury room rather

than being out in the hallway subject to possible influences by anybody that may be coming through the hallway, but use the jury room simply as a place for them to light.

Mr. Sears.

MR. SEARS: A couple of things.

It may be very difficult and very stilted and rather unfriendly to have to tell people that we are going to call you Ms. 235789.

THE COURT: That is why I suggested sir or ma'am is probably better.

MR. SEARS: There is that. What I was thinking, though, was to take that burden off all of us, I think you could enter an order directing that whomever is in the courtroom to cover this for the press, not report the names or identifying information of jurors on penalty of not being permitted to come back. I think that is well within your discretion to do that, and I imagine that the press would abide by such an order.

THE COURT: I imagine they would, as well.

MR. PAUPORE: We are going to have a court reporter, and I just don't know how we are going to get around the fact to have the individual identify himself for the record, unless we have protections in place, such as Mr. Sears suggested, an order prohibiting the disclosure of identity or some other system that we can ensure their

anonymity.

THE COURT: Well, I do have one representative of one arm of the media in the courtroom at the present time, and I would ask that they at least get back with their people in their media outlet to see if there is any conceptual issue with an order from the Court that would prevent them from putting somebody's actual name as a member of the jury panel in the media. If she would do that, I would appreciate that.

And I will consider entering an order that applies to all media and have them sign off on it that would preclude them, on penalty of sanctions, inclusive of being prohibited from covering the rest of the trial, and have them sign off on it if they violate the disclosure of jurors or their personal identifying information.

MR. SEARS: I think we need to be able to tell the jurors, particularly the jurors that are seated, with some degree of confidence they will not be filmed or photographed.

THE COURT: That part of the order the Court already entered, and the various media that we have had come in have signed off on. They are not allowed to photograph members of the jury or film them.

With regard to that, I don't have any up-to-date information on whether 48 Hours or 20/20, who is going to be covering the pool camera, if there is a pool

camera. I have heard from CBS that they were going to contact ABC to try to make some determination about whether ABC was still interested in being the pool camera, or whether they needed to coordinate that through CBS.

MR. SEARS: Mr. Robertson has some updated information.

THE COURT: Mr. Robertson, do you have information as a friend of the court at this time?

MR. ROBERTSON: As a friend of the Court, yes.

I was contacted a few days ago by ABC, and they indicated they were not contacted by CBS, but they are planning on coming here to be the pool camera. And they indicated they would not be here for jury selection.

THE COURT: I was told by the lady that was here last week -- it seems like long ago -- and she was with -- she was a producer with CBS, 48 Hours, if I am not mistaken, and indicated that their intention, although it was potentially to come -- now that they have been here and seen the layout, their intention was potentially to come in on the first day but not to bring cameras or do any filming on that first part of the case, either.

MR. ROBERTSON: My understanding is they are going the rely on ABC to provide the cameras.

THE COURT: That is what the initial order said because they were the first ones in the door, but they

are hoping, apparently, for the Court and my staff to coordinate that with somebody. Apparently, they haven't done that yet.

MR. ROBERTSON: I think we need to let them wrestle with that.

THE COURT: I expect so.

If ABC was not going to be covering it, they would have to bring their own camera and equipment and such. But frankly, they were indicating that there would be ways of potentially setting up a camera that could be controlled remotely, where there wouldn't even be a person sitting in the back of the courtroom. And I said that my staff and I would be very much in favor of that sort of thing, if they are able to make arrangements with my staff to do that. I would be happy to try to accommodate the least intrusive manner of coverage that they can technologically do.

MR. SEARS: I had a conversation with them sometime ago, and they were dismayed to learn that this courtroom does not have a dedicated media room. I don't know if you saw what happened to the sweat lodge case, but they had a producer in the hallway on the table next to the copier with a monitor.

THE COURT: And that building has lots more nooks and crannies.

MR. SEARS: No, when they did the hearing here, and that attracted a crowd of curious people wanting to know what was on television. It was proceedings inside the courtroom. They were monitoring it from outside. I don't think that would work very well here.

One other logistical matter that was raised by the interchange you had with Mr. Paupore. I suggested, and it may well have gotten swept up in all the other things that we have been doing here, the possibility of having at each session, morning and afternoon, maybe ten minutes with all eight jurors just to tell them what we were doing, to give them a heads up. We are going to do this, we are going to send you back in the jury room, bring you in here, we are going to ask you questions. Admonish them not to talk when they come back in, not to share with everybody else what they were asked, those kinds of things. And I think that might be a useful start at the beginning of each session just to acclimate the people to what was going to happen the rest of the morning and the afternoon.

THE COURT: It would, and to provide them, if you are prepared to provide them a list of potential witnesses that could be called, that would speed up the process.

MR. PAUPORE: I do recall, Mr. Sears, that part of the discussion. And it would be helpful, then, if we

could at least have those eight people asked if they know anybody else.

THE COURT: Absolutely. I don't see an issue with that.

MR. PAUPORE: We would have an opportunity to address at least some of the group.

MR. SEARS: To get the witness list, Your Honor, I think I asked the State to send us their witness list as a Word document, so we can merge it with our list and have one clean list.

THE COURT: How many pages do you all think we are going to have for them to read over in terms of number?

MR. SEARS: You can get your --

THE COURT: Double space it or make it --

MR. SEARS: Here is 219 names on the jury list on six and a half pages, and the witness list is probably -- the collective witness list is smaller than that or right about the same number, so it is probably six or seven pages for witnesses and six or seven pages for jurors. And if we could do it alphabetic -- one way to do it would be to take the witness list alphabetically, that way it wouldn't be clear who are State's witnesses and who are prosecution witnesses, and I know that Word has the capability to take a list and sort it alphabetically.

THE COURT: It does.

Mr. Paupore or Mr. Butner, is that something that you can accomplish? Send your witness list to the other side, and they can put it all alphabetized on one or more sheets of paper for the jurors to then receive and go over. We can hand it off to them when they first get here and tell them about the process that we are going to use.

MR. PAUPORE: Yes, Your Honor. And I am following up on getting the defense the witness list in Word Perfect.

MR. SEARS: Word.

MR. PAUPORE: Excuse me. In Word.

THE COURT: Old school there.

MR. PAUPORE: And, hopefully, they will follow my instructions and get it in alpha order.

THE COURT: Thank you.

MR. SEARS: You remember that actually the State was ordered to do that, but we will withhold the motion for sanctions until tomorrow.

MR. BUTNER: That would be a first.

THE COURT: Gentlemen, gentlemen.

We need to move on because we only have about an hour left here. With regard to the other important issues that you think we need to have final decisions on, I know some of those included motions for additional sanctions to preclude.

Ms. Chapman.

MS. CHAPMAN: Your Honor, what I think -- what I have on the list left is the 702 motion -- 701, 702 motion, the motion to preclude and then the motion to quash the subpoena for Anonymizer. And those are mine, and I will take them in order, mindful of the time that we have left.

Your Honor, with respect to the 702 motion, I think that the State's response indicates that they agree that they will not be offering shoe print identification testimony from Winslow, Kennedy or Mascher. And I think they also agree that those witnesses will not be offering opinion based on photographs, rather than their own recollection. Those were Your Honor's orders the last time we were here.

So, if we are in agreement about that, I can move to the piece remaining about which we disagree.

THE COURT: All right. Mr. Butner, what is the State's position?

MR. BUTNER: To clarify that, and I think the Court had already ruled on this.

THE COURT: I think I did with regard to the sheriff's office witnesses anyway.

MR. BUTNER: Right. Mascher and Winslow and Kennedy. Right.

MS. CHAPMAN: Okay.

MR. BUTNER: Mascher and Winslow and Kennedy, they are not going to say La Sportiva shoes made these prints. Mascher will be testifying as a tracker. Similarly, Kennedy will be testifying as a tracker. And this is in regard to the shoe prints. They will be able to say, I followed the same kinds of prints, these kinds of prints, for example, in regard to the one set of prints that we believe were the killer's prints. And then I followed these kinds of prints. We believe those were the victim's shoe prints out there.

There were shoes on the victim that appeared to be similar to those kinds of prints, only from the point that they had Zs on the bottom of the shoes. That is not to say that those are exactly the same shoes, but that is why they believe they were the victim's prints. We don't have that as a subject of expert testimony in this case, Judge, in terms of what they thought were the victim's prints.

In regard to the other prints that were followed by Mascher and Kennedy, those -- that ended up being found to be closely comparable to the La Sportiva shoes. That testimony will come from FBI witness Eric Gilkerson. But Mascher and Kennedy will and are prepared, and I would submit, we thought they were going to be allowed to testify that -- not that they had anything to do with La Sportiva

shoes, but that they followed those prints and they were the same -- the same kinds of shoes.

Now, as I understood the Court's ruling, the Court also indicated that Mascher, I thought, would be allowed to testify that he measured those footprints -- maybe I misunderstood the Court's ruling in that regard -- but he can't say that they are a match, and he can't say that they are closely comparable, either. He just measured them and didn't see any differences.

THE COURT: What is your offer of proof with regard to his measuring? He put a ruler down?

MR. BUTNER: Yeah, just put a ruler down and measured. That's all he did.

THE COURT: And can testify as to what he saw in terms of the length of it?

MR. BUTNER: Exactly. And I thought that the Court had -- in fact, I thought you specifically said that that kind of testimony would be okay.

In regard to Detective Winslow, he will testify that he took the defendant's bicycle out there, or bicycle tires, rolled them in the dirt, and he was unable to see any difference between the tire tracks out there in the dirt and the tire tracks that he rolled from the defendant's bicycle, and that they were similar to him. Not as an expert, but simply as a lay witness, and not in terms of an

absolute identification either. And I thought that the Court had ruled that that is how he would be allowed to testify.

THE COURT: With that clarification, Ms. Chapman.

MS. CHAPMAN: Your Honor, with respect to Mr. Winslow, the last time we were here we talked specifically about his ability to talk about comparisons between what he saw and then what he saw in photographs later, and you specifically precluded that kind of testimony at that time. And you also noted that testimony about similar or matching would be precluded by lay witnesses, because they are not trained to make those kind of comparisons. That is both with respect to shoe prints and tire prints. So, I think you had addressed that issue, and I think you had precluded it.

With respect to Mascher, what you had specifically said is that he can't testify as to a pattern of what he saw, No. 1, nor can he testify to a similarity to the shoe that was found. And I think that what Mr. Butner is saying now is that he understands the latter point but not the former, which is that Mr. Mascher is not to testify about what pattern he observed.

And as I recall, what they had disclosed from Mascher with respect to measurement and with respect to viewing the patterns was that Mascher looked at photographs,

and he drew comparisons based on those paragraphs. And he also did measurements based on photographs. He did not do measurements based on the scene. Those were not based on his personal observations of the scene. He did not prepare those in a report simultaneous to being at the scene. This was all done and disclosed very late and very recently.

I think the argument was, and what I think Your Honor found, is that he is not qualified as an expert capable of doing that from a photograph. If he had a present recollection from when he was at the scene and made those comparisons at the time or if he saw those patterns at the time, that is perhaps something he could do, but he didn't do. That is not in the reports. The only report we have of that was disclosed about two weeks ago or three weeks ago, and we brought that to Your Honor's attention as a late disclosure, and that was the subject of the motion that you argued and decided last time.

THE COURT: My understanding, based on the proffer that is made, is if Commander Mascher actually measured the prints out at the scene, then that would be admissible as an observation that he made. If he measured the prints simply in photographs, then I am not going to allow that. If his sole basis for comparison or identification of what he followed is on the basis of photographs for which he was not the photographer, I don't

think that that is proper. However, if he describes the pattern that he saw in tracking, that is disclosure.

As far as Winslow taking the defendant's bike tire out and being able to roll it and say, I am unable to see differences, that is the same as saying, I am able to see similarities. He is not an expert on that, and I won't allow that.

MS. CHAPMAN: Okay. Your Honor, I think that addresses the two areas.

And then we had asked Your Honor to make a determination about the admissibility of expert testimony on impression evidence. And Your Honor, we had talked about the findings in the NAS report. And significantly, in the State's response they don't at all address the NAS report, and the way that report affects both Your Honor's obligation with respect to reviewing the admissibility of evidence, or that courts have yet to consider it in this context. They cite Your Honor to some earlier *Frye* and even *Daubert* decisions that proceed the NAS report that don't address some of the specific findings that we cite to you in the motion and in the reply.

The NAS report substantially shifted the ground upon which courts consider forensic evidence. And Arizona courts, in particular, have identified that jury's place a specific, and in some cases, undue influence on this

kind of testimony. So we think it is particularly important in this case with respect to this evidence that Your Honor consider whether or not this kind of testimony has a proper scientific basis and is something that the jury should be permitted to hear.

The NAS report noted that this field is highly subjective. There are no threshold factors to create an identity between two sources of tracks. There is no studies about the number of matching coordinates or characteristics to create a probability determination. The field doesn't require any use of the scientific methodology. It doesn't require any continuing education in the field. It doesn't require examiners to be educated on the scientific method. It doesn't require any kind of number of points of comparison to draw any conclusions.

And Your Honor, that kind of testimony in this kind of case when the State is asking experts to make identity comparisons between tire tracks in the case of Mr. Hoang and shoe prints in the case of Mr. Gilkerson is incredibly important. And Your Honor, the State has not demonstrated that this kind of impression evidence, in light of the NAS report and the findings recorded there and outlined for you, are subject to scientific study or generally accepted in the scientific community.

And short of the State making that kind

of finding, we ask Your Honor to preclude this evidence, and at a minimum to hold a hearing, an evidentiary hearing where we could make the kind of determinations that would be required to admit any scientific or forensic testimony. And particularly, Your Honor, in a death penalty case where this is the only evidence, the only physical evidence the State has offered. These conclusions that are being offered by the experts thus far are incredibly tentative, and they have been outlined for you by the State in the response. And there is no scientific basis to make even those tentative opinions.

And so, we would ask Your Honor to preclude the testimony, or at a minimum to hold an evidentiary hearing on these issues.

THE COURT: My understanding is that is who you are going to interview in this next couple of days.

MS. CHAPMAN: We leave tomorrow, Your Honor.

We have interviewed -- and I'm sure I'm saying his name wrong -- Mr. Hoang. Mr. Sears interviewed him yesterday, and I think, confirmed what we are telling you from the NAS report was consistent with what Mr. Hoang said, in terms of there being no number or points of identity to make a determination, and no threshold requirements, no statistical studies about how you make those determinations.

THE COURT: To be fair, it was Mr. Gilkerson that you were talking about going to see in the next couple

of days.

MS. CHAPMAN: Yes.

THE COURT: Mr. Sears.

MR. SEARS: I was just going to add that Mr. Butner and Mr. Robertson and I did interview Mr. Hoang from the Department of Public Safety yesterday. Ms. Chapman is correct that he acknowledged that for tire print comparison, there are no objective standards. He has a protocol that he follows that talks about class characteristics. He told us that this was the first bicycle tire case that he or anyone that he talked to at the lab had been asked to look at. And that for many of the problems that you know about relating to the poor quality of the photographs, there were only four images of the bicycle tire tracks that he even considered looking at. And we spent a great deal of time with him yesterday talking about his impressions and conclusion.

I will simply just add to the mix that I think the probative prejudicial 403 analysis, the little that he has to offer that you have seen reflected in the reports that have been attached to many documents over the course of this case are outweighed by the possible prejudice and confusion of the jury that he somehow was scribing science and objective standards to his work. He is a very candid witness, and I don't think he would tell you that.

THE COURT: Mr. Butner.

MR. BUTNER: I agree with Mr. Sears. He is a very candid witness. He was very careful about his observations and his conclusions, too. He rejected a large number of the photographs. He ended up just relying upon four that he found to be sufficient for his purposes. And his opinion was carefully crafted. He basically stated that he could not exclude the defendant's tire tracks from the general classifications of tires that make those kinds of prints, and he was able to identify what it was, the factors that caused him to be able to offer that opinion. He didn't say they were identical. He didn't say they were a match. It was simply a very carefully crafted opinion. And he alluded to the fact that there were many, many tires like that, possibly even millions of tires like that.

So I think that that, coupled with the fact that he has been qualified as a tire track expert, I believe he stated in the interview approximately 20 times, and we have done a little bit of research on that and found that he has been qualified in the Arizona Superior Court in Maricopa, Mohave, Pima, Pinal County, as well as Coconino and Yavapai. So, he has been qualified as an expert before, and he has been qualified on these kinds of matters. I would think that is sufficient for him to offer an opinion based upon his training and experience as an expert to assist the

jury on this particular question.

In regard to Mr. Gilkerson, Mr. Gilkerson we submitted to the Court a case in which he had been qualified as an expert in federal court and had gone through a *Daubert* hearing, and he's testified on numerous occasions, not in any courts in Arizona, but in federal court and in California. And he indicated that -- and he has been qualified as an expert in those courts.

And his testimony is based on a very large data base of shoe soles that are submitted and is very narrowly crafted. And he is able to point out, although we will find out in his interview, he is able to point out the various characteristics that cause him to believe that the shoe prints at the crime scene were closely comparable to the La Sportiva shoe. And he is able to articulate the facts that cause him to reach that conclusion, Judge. He is also is a forensic examiner with the FBI laboratory and has been so since 1999.

So, I think that there is little left to speculate about in terms of his qualifications as an expert witness, particularly under the laws of the state of Arizona and Rule 702, in terms of his ability to offer an opinion that will assist the jury.

THE COURT: Miss Chapman.

MS. CHAPMAN: Your Honor, that is not really

the issue, whether or not Mr. Hoang or Mr. Gilkerson have previously been identified or qualified as experts in the field. The issue is: Is that field one that is the proper subject matter of expert testimony, given the fact that it lacks scientific foundation? The National Academy of Science's report was issued in 2009. The cases that Mr. Butner cited to the Court with respect to Mr. Gilkerson's Daubert hearing well proceeded that 2009 report.

The question is: Does this kind of testimony, which Arizona courts have recognized, have a tremendous impact on a jury? Does this kind of forensic testimony have a valid scientific basis such that it should be offered? Can it be tested, can it be measured, is it based on a scientific method? And the findings in the report suggest that they are not. And those questions are not answered by whether or not Mr. Hoang and Mr. Gilkerson have previously been qualified as experts. Those questions remain unanswered by this Court, and frankly, by any court with respect to impression evidence that we have been able to determine thus far.

And Your Honor, I guess as a secondary point that was raised by Mr. Sears, with respect to the extent of the opinion that Mr. Hoang offers, which Mr. Butner describes as not being able to exclude a thousand different kinds of tires, and with respect to Mr. Gilkerson's very

limited opinion about what is closely comparable, I would suggest that even if you are not persuaded that these opinions are not based on a scientific method, which I think there is no foundation for concluding that they are, but even if Your Honor got through that threshold, the 403 question is incredibly significant given the kind of emphasis that juries place on these kinds of witnesses and this kind of testimony.

And given that these opinions are very tentative and given that they don't do much, other than exclude or cause something closely comparable, I would say that the prejudice and the likelihood of confusion to juries when they are offered this kind of testimony from people who are offered up as experts, with the lack of scientific foundation, particularly in the context of a death penalty case, that the prejudice would outweigh the limited probative value given the kinds of opinions that these purported experts are offering in the field in which they are offering it.

At a minimum, Your Honor, we'd ask you to hold the evidentiary hearing to make that kind of determination about this kind of evidence. Let's bring them in, let's find out how do they draw those conclusions, what scientific method do they use, what points of comparison are required, what kind of data base do they have that determines whether something is closely comparable or not to be

excluded. Your Honor, if we had that hearing, we could determine whether that is the kind of evidence that the jury ought to hear in this case.

THE COURT: At this point I am going to deny the motion to preclude the testimony of experts pursuant to Rule 702.

I want the State to keep the Court advised in terms of when Mr. Gilkerson may testify, when Mr. Hoang may testify, so that if I believe it is appropriate at the time, we could conceivably conduct a brief hearing outside the presence of the jury for me to satisfy myself that there is sufficient scientific basis under Rule 702 to admit the evidence.

Counsel is correct that the NAS report does contain some interesting and troubling conclusions, but simply based on what I have right now, I am not prepared to preclude the experts. Perhaps we can find a place in the various things that we are having to do as we get into trial to have Mr. Gilkerson, after he has been interviewed and perhaps a transcript of the interview or pertinent segments of the transcript of the interview presented to the Court with regard to those issues.

So at this point I am denying the motion without prejudice.

(Whereupon, a discussion was held re potential jury panel

which was reported but is not contained herein.)

THE COURT: Thank you.

Other motions that need attention urgently, Miss Chapman?

MS. CHAPMAN: Your Honor, I think that the other motion that we can take up today is the motion to preclude the 55th through 57th, I think is where we are.

THE COURT: Right.

MS. CHAPMAN: And the State filed a response this morning. I am not sure if Your Honor received a copy of that.

THE COURT: I think so. Bear with me. Well, I am not sure that I have it on the bench, but why don't you go ahead.

MS. CHAPMAN: Okay. Your Honor, I will go one by one.

And the first issue is with respect to the Stuchman Forensics [phonetic spelling], photos and CDs. Your Honor, on April 1st, the State disclosed a CD labeled Stuchman Forensics. It appeared to have photos of shoe prints, and then it also had some lines being drawn between photos of shoe prints and a shoe. There was no report about what it was. There was no CV for Stuchman Forensics. There is no identity of Stuchman Forensics as a witness. No one from that organization identified. There was no 15.6

disclosure with respect to this evidence. And frankly, I don't know what it means or what it is.

MR. BUTNER: Withdrawn.

THE COURT: Okay. Thank you.

MS. CHAPMAN: All right. The next issue, Your Honor, is with respect to a report from Eric Gilkerson. I am going to address this issue here. I think you partially addressed it the last time we were here.

Mr. Gilkerson has now prepared a report based on the model shoes that were provided to the defense on April 20th. Our expert is attempting to examine those, but our complaint was that with respect to this report, that was based on sample shoes that we had not received and relates back to the report that had been withheld from us for five months while it was in the State's possession and we were litigating these issues, that this report should be excluded.

The conclusion in the report is that these shoes could be the sources of the prints identified in the photos. And Your Honor, given the timing of the disclosure on April 2nd, given that we did not have access to those sample shoes prior to April 20th, we are asking that Your Honor preclude that report.

I would also note that more recently, a May disclosure more recently than this was filed, the State has asked Mr. Gilkerson to reach still yet other conclusions

about other shoes and has sent him other shoes to do that. I believe those are Carol Kennedy's shoes. And that disclosure was just made and will be briefed to Your Honor shortly in terms of another motion.

THE COURT: I am going to deny the request to preclude at this point, but I am going to do so without prejudice, given that you have an interview with Mr. Gilkerson in the next day or so. You may re-urge this when we meet again next week after you have had an opportunity to find out, No. 1, more about his report, but No. 2, about what your expert needs in terms of time or information in order to file his or her report.

Mr. Butner.

MR. BUTNER: Just to confirm something. I believe you indicated that your expert got the shoe or shoes, and also in connection with that transmittal of those shoes, I believe he got copies of Mr. Gilkerson's big photos accompanying those shoes.

MS. CHAPMAN: I don't have an answer to that.

MR. BUTNER: Lack of better way to describe them, they are the big photos.

THE COURT: Mr. Robertson may have some information. Even though he is not an attorney, I will recognize him for purposes of information.

MR. ROBERTSON: Appreciate it. I will be

brief.

The State delivered the exhibit the next morning after you ordered it. Detective Sechez gave it to me in a sealed evidence box. I did not open it. So it was delivered to our expert as it was delivered to me. I don't know what was inside of it at this point.

THE COURT: On April 20?

MR. ROBERTSON: I believe that is right. That sounds right.

THE COURT: Thank you.

MS. CHAPMAN: Your Honor, just to flag the issue. I noticed that yesterday we were disclosed a series of Bates labeled photographs from Mr. Gilkerson, and I know we have received some other late disclosure from him. Again, we will be briefing that later, whether or not Mr. Anglin received it on the 20th. I know some things were disclosed after that date by Mr. Gilkerson.

THE COURT: That is your expert.

MS CHAPMAN: Mr. Anglin.

I believe the next issue is with respect to Forensic Consulting Solutions. We received on March 19th a CD and a one-page report related to this Forensic Consulting Solutions. No witness or expert had been identified. No 15.6 disclosure had been made with respect to this evidence. We have no idea what it was about or why it

was done.

I notice that we also -- I guess from the State's reply, then I learned today as we were sitting here in court, the State has now disclosed an individual from this institution as an expert. This is the first time that person has been disclosed as an expert.

THE COURT: Name, if you have it?

MS. CHAPMAN: Lynita Hinsch. This was in a supplemental. Lynita Hinsch from Forensic Consulting Solutions.

THE COURT: Spell the first, if you would.

MS. CHAPMAN: L-Y-N-I-T-A. The last name, Your Honor, is H-I-N-S-C-H.

We conducted a partial interview of one of the State's five other computer experts yesterday. The interview was terminated early. But I have no idea why this expert is being listed now. Certainly, we are now within the seven days. The seven days was yesterday. There was no application made to the Court that I am aware of to request that this disclosure be made. And I think if you look under 15.7, which I believe would be the comments about what the State would be required to show, they could not make that showing with respect to this witness or this evidence. And we'd ask that it be precluded, both this evidence that was disclosed on March 19th and then her identity as an expert

witness that was made today.

THE COURT: Let's take them individually, then. Mr. Butner or Mr. Paupore.

MR. BUTNER: Judge, Lynita Hinsch was disclosed as a witness on February 18, 2010. Accompanied by that disclosure was her CV. However, we omitted putting her on the expert witness list. She was identified, though, as an expert by virtue of her CV at that time.

THE COURT: Expert in computers?

MR. BUTNER: In computers, exactly. That is what she would testify about.

Just to take issue with counsel's description of the interview yesterday that was, quote, terminated early. It was terminated at about seven o'clock when everybody's stomachs were rumbling, and the witness was having trouble even answering questions anymore, and we were also being booted out of the building that we were doing the interview in. I wouldn't call it an early termination of an interview. The interview had already gone on in excess of five hours, to my recollection, at that point. We agreed that we could reconvene at another time and complete that interview.

THE COURT: What is Miss Hinsch purported to have examined or evaluated that pertains to the case, just in a general brief --

MR. BUTNER: Quite frankly, Judge, we haven't got a final report from her, so we don't know.

THE COURT: Ms. Chapman.

MS. CHAPMAN: Your Honor, I will just say that I disagree with Mr. Butner's characterization of that interview. I noticed the State in terms of how long that interview would take. We offered to host it at an office that wouldn't require us to leave early, and we offered to move the interview to that other location, and Mr. Butner said he was going to terminate the interview.

So, with respect to -- back to Miss Lynch, what we got --

THE COURT: Miss Hinsch.

MS. CHAPMAN: Excuse me. Miss Hinsch.

THE COURT: I don't want the record confused as to who we are talking about.

MS. CHAPMAN: Sure.

What we got on February 18th was a CV. There was no identification of who this person was, what she was doing, how she was related to case. There was no report from her, no report about interaction with her, so we had absolutely no idea that she was going to be an expert or what she was going to be investigating.

The State's reply indicates that her analysis is on-going and whether she discovers any material

evidence remains to be seen. Your Honor, at this point in the absence of the 15.6 disclosure, and in the absence of her being newly discovered or her identity or what she is investigating, which is, as I understand it, in the realm of computer forensic examination, in the presence of the State's five other noticed computer forensic experts, and given the time that we have remaining, I would ask Your Honor to preclude both her as an expert and any reports or evaluations that she either has made, which I am frankly unaware, and any that she may make in the future given the timing.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, what she has done is copy a portion of the hard drive that was protected by some sort of a special program, and they were able to get through this encrypted area, and basically we have got a copy of that. It is a contents of the Safeguard Private Disk Volumes located on Mr. DeMocker's documents.

MS. CHAPMAN: And the last thing, just to point out, Your Honor, this relates to the motion to quash the subpoena. The State was aware of this software on this computer as of December of 2009. And for them to ask Miss Hinsch in February or March of 2010, a few months before trial, and not disclose whatever report she may or may not be doing now when we are within seven days of trial, is simply inexcusable. It does not comply with your orders. It does

not comply with Rule 15. And it should be precluded both under Rule 15.6 and 15.7.

THE COURT: So, this pertains to your motion to quash also?

MS. CHAPMAN: The motion to quash was with respect to a subpoena to Anonymizer, which is the software that Mr. Butner was referring to that Miss Hinsch was somehow involved in, and I don't know what her involvement is because I haven't seen a report about that.

THE COURT: I think I am following you.

Well, I don't think that simply listing the CV is sufficient disclosure under 15 to not have a report, at this stage of the proceedings, so that there is some fair idea of what she may testify to. The report is not done yet because the investigation is not done yet, and I haven't been presented with any particular information as to what Miss Hinsch may be used for that is different from what the other one, two, three, four or five experts on computers may be used for. Or, as far as I can tell, there isn't any level of certainty on the prosecution team at this point as to whether or not they are really going to use Miss Hinsch, also because the investigation or part of the investigation apparently isn't done yet.

It is true that we are within seven days of the trial date at this point. I am inclined to preclude

Miss Hinsch from testifying or from the State presenting a report concerning that. If there is something really distinct that she winds up with, I suppose I may -- you may wish to have me reconsider that decision, Mr. Butner, but at this point here we are right before the trial. I am not sure that I would reconsider it. I am not giving you any guarantees that I would.

MR. BUTNER: I understand, Judge.

THE COURT: It seems to me it would have to be thoroughly critical to the State's case and distinct from what some other computer expert might say, so that there is some overriding necessity to do it. And I suppose I will probably need some explanation as to why it was not done earlier than what it was.

Ms. Chapman, next.

MS. CHAPMAN: Yes, Your Honor. The next is a document that was disclosed that lists date, time and activity. It was disclosed, I think --

THE COURT: Is that the log-in, log-out allegedly for UBS?

MS. CHAPMAN: Allegedly. The document isn't identified that way. It is identified by the State that way. There is no indication at all where that came from or who provided it or when it was provided. It was disclosed to us on March 23rd. There is no way for us to determine what it

is. Mr. DeMocker was arrested approximately 16 months before it was disclosed to us at UBS. So I don't know why it is being disclosed to us now.

THE COURT: For clarification sake in my mind, did the dates on this log-in, log-out for UBS relate back to some earlier time when Mr. DeMocker was not in custody?

MS. CHAPMAN: They do, Your Honor. To the best of my recollection, they do. But again, I don't have any way to determine where that came from or how it was created. It literally is a chart, time, date, and activity. It doesn't say log-in, log-out. It doesn't say anything about UBS. It doesn't say anything about Mr. DeMocker.

THE COURT: Do you know a beginning date or end date?

MS. CHAPMAN: I think it is June and July of '08, Your Honor.

THE COURT: So, in the time frame within a month or more so before the death of Ms. Kennedy.

MS. CHAPMAN: Sure, yes. That is the best of my memory, Your Honor.

The State's reply indicates that it accidentally overlooked this document. We have had, as you know, literally I would guesstimate in the 20 -- actually, I know we have received over 20,000 pages of disclosure from UBS and UBS-related entities in the form of e-mails and

otherwise.

So, Your Honor, at this point in the absence of some other explanation that it was just overlooked, and given that we don't have any idea what it is, where it came from, or when it was disclosed to the State, we'd ask Your Honor to preclude it. I simply don't know what it is.

THE COURT: Mr. Butner.

MR. BUTNER: Apparently, Judge, it is a log-in, log-out sheet on Mr. DeMocker's computer, his UBS computer, and it was provided to the State very early on in this case. I believe by way of subpoena. It went through Mr. Henzy, the attorney that was representing UBS at that time, and he directly provided that particular record. And for some reason, it did not get disclosed. And that's where it came from. And it comes from UBS. Basically, they are saying that that is their record. I guess, they somehow kept this kind of a log record. It is a very plain sheet of paper with just this log-in, log-out type of information. And we overlooked it.

THE COURT: Critical need for the State's case is what?

MR. BUTNER: It is not a critical need to the State's case. It kind of establishes when the defendant came to work on July the 2nd and when he checked out of work and

that kind of thing. And there is a period of time right around that same time frame.

THE COURT: Doesn't sound like a critical need, and does sound like it wasn't disclosed in a timely fashion. I am going to exclude it.

MS. CHAPMAN: Moving on. The next is with respect to a witness, Dan Jensen. Mr. Jensen was disclosed as an expert on March 26. We weren't provided with any CV or any report. He was just listed in the disclosure. Your Honor ordered the identification of witnesses on April 12th. He was not listed as an expert in that list. He was, however, listed as a custodian of records.

As Your Honor knows, the cell tower information has been an issue in this case since November of 2008. It was at that time that the defense made repeated requests for this information as it relates to Mr. Knapp.

Today in the State's reply that I received this morning, they are now identifying him again as an expert on Sprint cell towers, the capability of Sprint cell phone network, and the manner in which Sprint keeps track of time logs on Sprint cell phones, coverage map of Sprint cell phone towers. Apparently, he is now offered as an expert on those areas. Again, we don't have a CV. We don't have a report. He wasn't disclosed as an expert on the April 12th list. And the State has known the cell tower

information was relevant since November of '08.

And they also identified another late disclosed expert with respect to cell tower information, Sy Ray. And just by way of clarification, since we are in our seven-day time frame and certainly within the 30 day time frame, there was no 15.6 that was filed with respect to Mr. Jensen or cell phone tower information, in general.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, Mr. Jensen is the custodian of records for Sprint, and it came to our attention that testimony concerning Sprint cell towers and so forth would be important in this case, and we found out that basically Mr. Jensen is also the person that gives you that kind of information. He is an engineering sort of a guy that travels around the country testifying in Sprint cases where their cell tower information and characteristics and telephone network characteristics come up. And so, we believed it was important to identify him as an expert so he can testify concerning what goes on with Sprint phones and their cell towers.

He is critical to the State's case in terms of information that Sy Ray would rely upon and has relied upon in doing his investigation concerning the cell towers and usage of the cell towers by Mr. Knapp, who happened to have a Sprint cell phone. And so it became

especially critical once it was alleged by the defense that there was third-party culpability on the part of Mr. Knapp, which was, as I set forth, the date in our response.

THE COURT: So, is he a custodian of records or is he an engineering expert?

MR. BUTNER: He is both for Sprint.

THE COURT: And he was disclosed as a custodian of records March 26, so --

MR. BUTNER: Yes. We didn't really know at that point in time what his expertise was. We were just told by Sprint he was the records custodian for this stuff, and then we found out that he also had this engineering background and testified as to characteristics -- basically as to the characteristics of the Sprint cell phone network.

THE COURT: And so, was disclosed as an expert only today?

MR. BUTNER: No. He was disclosed as an expert before that.

THE COURT: Anybody have a date for me?

MR. BUTNER: I am asking.

MS. CHAPMAN: Your Honor, if I might, I think he was disclosed as an expert on March 26. Then on April 12 he was identified as a custodian of records and not as an expert on the State's witness list, which you ordered them to disclose to the Court and to the defense. Then today, he was

re-identified as an expert. So he was identified as an expert with no CV and no report, which we still don't have, and no 15.6. Then he was removed as an expert. And now today again disclosed as expert with no CV and no report.

MR. BUTNER: He was not removed as an expert, Judge. He was also identified as a custodian of records.

THE COURT: I am going to deny the request to preclude Mr. Jensen.

Next I have Steven Pitt, I think, or is that moot?

MR. BUTNER: Well, Judge, I think you saw the explanation for Dr. Pitt. He is a rebuttal witness. He is certainly not going to be offered as any part of the State's case in chief. We would like to preserve the right to call him in rebuttal, if and when we get to the penalty stage.

THE COURT: In regard to what issues?

MR. BUTNER: In regard to issues about the defendant in terms of not being able to commit a crime like this from his psychiatric point of view, on his character and issues concerning his state of mind, facts that would likely be adduced at trial in this case and in mitigation.

THE COURT: In terms of ability to render such opinion, what is the basis of his opinion going to come from? As I understand the claim by the defense is that he has never interviewed or met Mr. DeMocker.

MR. BUTNER: I believe that he will be reviewing materials that are submitted by the defense, if and when we reach that point.

THE COURT: Ms. Chapman.

MS. CHAPMAN: Your Honor, there are several issues with Dr. Pitt. First, he was late disclosed as a witness, period. He was not disclosed until January 29. Secondly, he was not identified on the State's witness list at all. The one that was -- you, Your Honor, required disclosed on April 12, he is not listed there anywhere.

And Your Honor, with respect to the 15.1 notice, and we have raised this issue repeatedly, the State's disclosure has been entirely incomplete. Your Honor told the State back in November, I believe, that their disclosure with respect to what Dr. Pitt would rely on was insufficient, and that they needed to identify the documents. They identified things like a summary of the financial condition without identifying where that came from. We certainly haven't received that. They identified any and all e-mails between Mr. DeMocker and Ms. Kennedy, which at this point has been excluded, and which Your Honor knows there are several hundred, thousands, and none have been specifically identified.

Also, the State has failed to identify what he will rebut and what aggravator they allege is going

to support, all of which was required under the rule, and all of which has been raised.

In the earlier filed February motion, these same issues with respect to Dr. Pitt was raised. There has been no 15.6 disclosure about him. There is no report from him. He has never met or examined Mr. DeMocker. He is a psychologist. And Your Honor, in the State's reply, they indicate he is going to be testifying about Mr. DeMocker's state of mind.

And I think given what Mr. Butner just indicated that he believes Dr. Pitt will be testifying about, he has no foundation to reach any conclusions about those matters, whether or not he reviews records or not, and he certainly wouldn't be permitted to do that somewhere in the middle of trial when we presently have no report from him and no adequate notice about what he's relied on, what he is going to rebut, or what aggravator he would be offered in support of.

THE COURT: Can you address those issues, Mr. Butner?

MR. BUTNER: Judge, I am not offering Dr. Pitt concerning an aggravator, but rather in the penalty phase, and the evidence that would be submitted by the defense in terms of mitigation. So it would be in rebuttal to things submitted by the defense at that point in time.

THE COURT: Thanks for the clarification.

MS. CHAPMAN: Your Honor, the State has previously advised both the Court and the defense that they would not be offering any witnesses at the penalty phase. They didn't list any witnesses for penalty, which Your Honor specifically directed them to do in the April 12th witness list. So this is the first time that the defense has heard that Dr. Pitt would be offered in the manner in which Mr. Butner is suggesting, and it is contrary to what the State has previously indicated within pleadings and orally on several occasions to this Court.

So on that basis alone, if that is the extent to which Dr. Pitt is being offered today for the first time, he ought to be precluded on that basis. Not to mention the fact that whether or not he is offered as rebuttal in penalty, the State would still have to identify what he relied on and what the foundation for his opinions are. We have no report from him and no way to prepare for that.

THE COURT: I will preclude Dr. Pitt. Thank you.

MS. CHAPMAN: Your Honor, the next issue is the divorce record from 2006.

THE COURT: Right.

MS. CHAPMAN: Your Honor, the State's response is that, well, certainly the defendant knew he was divorced.

That is not the standard for disclosure. These records were disclosed to us on March 26. The State has certainly been aware of them for an incredibly long time. The earliest mention I can find of it is in June of '09 in their records. So, they did know about it, and I don't know why they didn't disclose it. And their response is simply that apparently they think if Mr. DeMocker is aware of the fact, they are not required to disclose documents relating to it, which as both the State and Your Honor knows, is not what the rule requires.

THE COURT: What records are you speaking of in terms of divorce records?

MS. CHAPMAN: Basically, there was a divorce file. There was a divorce filed in 2006. There was preliminary litigation and then it was abandoned, so those are the records.

THE COURT: Same number or different number from the events that they had counsel on later?

MS. CHAPMAN: Different number, I believe, Your Honor.

THE COURT: Okay. Thank you.

Mr. Butner.

MR. BUTNER: Judge, I just felt as if it might come up, in terms of the marital history between the victim and Mr. DeMocker, as to how long they had had difficulties,

and I thought it would be appropriate to present matters of public record that they had filed a previous divorce petition and then abandoned that action. That is why I offered those records.

THE COURT: At this point in terms of the State's case in chief, I am going the preclude it. But in terms of if there are issues that may need rebutting based on -- for impeachment purposes, I will revisit the issue if you wish me to.

MR. BUTNER: Thank you.

MS. CHAPMAN: Your Honor, we had filed a motion to preclude with respect to two different sets of -- excuse me. Hi, Phil.

(Whereupon, a discussion was held re potential jury panel which was reported but is not contained herein.)

THE COURT: While we are doing that, Ms. Chapman, what other issues are you still looking at? Bank records and photos?

MS. CHAPMAN: Yes, Your Honor.

With respect to bank records, we had filed motions to preclude with respect to two sets of Bank of America records and the American Express records. The State only responded with respect to American Express. And I think what the State's response is is essentially that Your Honor, in your earlier ruling, decided that you weren't going to

preclude any bank records based on late disclosure, which wasn't my understanding of what you had decided.

And so with respect to one of the Bank of America records in particular, these relate to the estate records of which Katie DeMocker was the executrix. The State was aware of those certainly as early as October '08. They did not disclose them to us until April 2nd. They are not at all relevant. I don't know how they would be relevant. And we ask Your Honor to preclude those in particular, but there are three sets of bank records disclosed in April.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, I am not sure about the records of Katherine DeMocker as executrix of that B of A account, and I can't think of the relevance of those. But the other records are efforts to get the complete records from the defendant's bank accounts, which were numerous, and we had difficulty getting complete records, and we discovered that we didn't have complete records for those accounts, The National Bank records and B of A accounts and also the American Express account. That is why we subpoenaed those records again and again and again. There is so many of them that it was hard to keep going through them and analyzing and finding where they were missing.

THE COURT: And the import of those for the State's case?

MR. BUTNER: Well, Judge, quite frankly, all of these bank records have been marked as an exhibit, but it is unlikely that the State is going to be putting in all of these bank records. But Mr. Echols has relied upon statements from all of these bank accounts. And we wanted to make sure that we had all of the complete account records for each of these accounts, rather than just, for example, the latest statements, so to speak, to support his opinions. And that is why we subpoenaed all of these records. They are critical to the State's case in that regard, although they may very well not end up in evidence in this case.

THE COURT: But he rendered the opinion without the records?

MR. BUTNER: He didn't render the opinion without the records, per se, Judge. It is just, for example, you can look at bank account records, you can see that he had "X" number of dollars at this point in time. If they skip several months, you can see he had "X" number of dollars at this point in time. You have a statement here and you have a statement there. You can fill in the gaps. That is the kind of thing that was done with these sorts of records. That includes the American Express records, too. Mr. DeMocker lived using credit cards, basically, all of the time rather than money.

THE COURT: Some people do that.

MS. CHAPMAN: Your Honor, might I interrupt. If we have an answer, I know Phil is waiting.

(Whereupon, a discussion was held re potential jury panel which was reported but is not contained herein.)

MS. CHAPMAN: Your Honor, we are very close and I will go as fast as Roxanne will let me go.

With respect to the bank records, back to the bank records, Your Honor. It is very hard for us, and I think it is obvious from Mr. Butner's response that it is very hard for to us to know what to do with all these records. We keep receiving them. If Mr. Echols is going to rely on them, then we have to be able to review them. Mr. Echols hasn't created or drafted another opinion or report since it was generated and will not be offered, we understand. So I am not sure what to do with that information.

What I can tell you specifically with respect to those Bank of America account records for Katie as the executrix of the estate, I don't think those have any relevance to the issues that Mr. Butner identified earlier.

THE COURT: I think he conceded that.

MS. CHAPMAN: We are asking Your Honor to preclude those. At some point the State has to stop. Mr. Echols has to stop.

THE COURT: The Court will preclude the newly

disclosed records from April 2nd, since they were not relied upon for purposes of evaluating the records and providing the opinion. The State agrees the reason for the records was to support Mr. Echols' opinion. He has not changed his report.

For those reasons and because they are newly disclosed, I will preclude them. If they are absolutely necessary for impeachment or rehabilitation purposes, after attack or cross-examination by the other side, I may revisit whether some of those may be able to be used. But don't count on my reversing course on that. But in the interests of the truth seeking process and fairness, I may revisit that for selected purposes.

MS. CHAPMAN: Your Honor, the last two issues, one is with respect to this photo disk of Y-Y, which were photos of the 840 Country Club. Those accompany the report that the State acknowledged last time that they had no justification for disclosing late. So those photos were taken at that same time. I believe sometime in '08.

THE COURT: What is the relevance for 840 Country Club at all?

MR. BUTNER: Judge, in the State's response, which apparently you didn't get, the State -- we indicated that basically the photos show -- the most important thing is they show the residence, but they show the instructions that were left at the residence on how to use the Internet. And

this is the Internet that was used by Mr. DeMocker when he purchased the books on how to flee; that Internet connection, a Wifi connection.

THE COURT: They don't sound necessary to me in terms of the State's case, at least not particularly necessary. And since they weren't disclosed and were overlooked by one of the officers or detectives, and there wasn't a good reason based on our prior discussion about that, I don't believe that the photos are necessary to the State's case or of critical importance, and I will preclude them.

MR. BUTNER: They can still be used for impeachment purposes; right, Judge?

THE COURT: If there is some testimony for which they are necessary for impeachment purposes, I may allow them, but that will take a request without jumping right in with both feet. I need to know in advance of that and the defense needs to know in advance of that. If there is some articulable urgent necessity for them, I may revisit the issue for purposes of impeachment. But, again, I am making no guarantees that I would change my mind about this.

MS. CHAPMAN: Your Honor, just for purposes of the record, is that true with respect to all the evidence that you precluded?

THE COURT: No. These particular items where

I have mentioned it.

MS. CHAPMAN: And the State would need to raise that issue before offering the evidence?

THE COURT: Exactly, or approaching a witness with it. I will have a side bar or something like that, or a hearing at the end of the day or interim period when the jury is not in the room.

MS. CHAPMAN: Okay. Your Honor, the last issue is with respect to late disclosed witnesses. There are two categories. One category is with respect to witnesses who the defense attempted to interview in mid-February and the State indicated they would not be calling. I have listed those witnesses. I think there are about seven of them. Some of them are from the Back Country Search Team. Others are from YCSO primarily. And those people, again, we attempted to interview them in mid-February. The State said we don't intend to call them. Some of those interviews were schedule and then cancelled. And those people showed up on the State's witness list on April 12th. So that is one category of witness.

The second category --

THE COURT: Let's take that category first.

Mr. Butner.

MR. BUTNER: Okay. If I understand, these are the witnesses that you are referring to: Anne

Gordon-Lorentzen, Leslie Madaffari, Alyssa Watt, Ken Brewer, Sandi Brown.

MS. CHAPMAN: And Townsend, Halter and Lee from the Back Country --

MR. BUTNER: And the Back Country Search Team. Okay.

State won't call Townsend, Halter and Lee from the Back Country Search Team. I identified them out of an abundance of caution, Judge. We only had one person from the Back Country Search Team. If that person isn't available, we thought we better have someone else, in case he wasn't. He might be out searching for something.

THE COURT: If you could spell those several names for the court reporter, it would be much appreciated.

MR. BUTNER: Townsend, T-O-W-N-S-E-N-D. Halter, H-A-L-T-E-R. Lee, L-E-E.

And then I will spell the other ones, too. The other ones are with the Yavapai County Sheriff's Office and they are evidence custodians. And one of them actually was interviewed. Anne Gorden, G-O-R-D-E-N hyphen Lorentzen, L-O-R-E-N-T-Z-E-N. Leslie, L-E-S-L-I-E, Madaffari, M-A-D-A-F-F-A-R-I.

THE COURT: That is the one that caused me to have you spell.

MR. BUTNER: Okay. Alyssa, A-L-Y-S-S-A, Watt,

W-A-T-T. Ken Brewer, B-R-E-W-E-R. And Sandi with an "I," Brown, without an "E," B-R-O-W-N.

State was not planning on calling those witnesses, but somehow if something came up in terms of chain of custody or transmittal of evidence, something along those lines, then the State would feel it necessary to call those witnesses. I listed them because of that.

THE COURT: All right.

Ms. Chapman.

MS. CHAPMAN: Your Honor, the other category of witnesses are witnesses that were never disclosed prior to the April 12 deadline. And in fact, just so the record is clear, Your Honor had ordered the parties to simultaneously file witness lists identifying the witnesses, for what phase they are going to be called, by nine o'clock, April 12. The State filed that without identifying witnesses in either category, and then they filed a supplemental list with additional first disclosed people that afternoon.

Again, those people were not -- I think that secondary list was identified as being offered for the case in chief. There were no designations on the first list and the second list was offered that afternoon. There were several people on that list who were never before disclosed as witnesses. Those people are Jan Greenhow, G-R-E-E-N-H-O-W. She is listed as an appraiser. We have no

information about who she is or how she might be relevant.

The second witness is Karen Gere, G-E-R-E, who is indicated as offering testimony relating to the autopsy.

THE COURT: She is with the medical examiner's office.

MS. CHAPMAN: Right. And she is indicated for the first time on April 12 as offering testimony about the autopsy from April 3rd, 2008. She has never before been listed or identified as a witness.

Dan Pryor from D.P.S. is apparently relating to a motorcycle. That is all that the list says. No report or interview from him.

Michael Kalmback, who they listed in this witness list on April 12, and then a couple of days ago, Your Honor, we got a partial police report that is incomplete -- that report itself notes it is incomplete -- and we got an interview of Mr. Kalmback on audio which we are presently having transcribed, and that is the first time he has been identified. He relates back to the conversation that was discussed earlier of the voice in the vent that the State has known about for over ten months.

THE COURT: Of the what?

MS. CHAPMAN: The incident that Mr. Butner was talking about, about the voice in the jail and the

information from the jail about other possible perpetrators that the State has known about for over ten months now. It was through their investigation that they identified Mr. Kalmback and late disclosed him and still haven't disclosed the police report, the complete report from that interview.

And then there are a couple of custodian of records who are listed for the first time from Amazon and the State Department.

But again, we don't have any information with respect to some of these witnesses. They were all disclosed for the first time on April 12th with no 15.6 notice, no indication of who they were, no reports about who they were. This case has been pending for over 18 months, and the State has been aware of what the trial date was since May.

Your Honor, Mr. Sears also points out to me that we also have no criminal history for Mr. Kalmback, who we understand is in the custody of the Department of Corrections. So that is another piece.

THE COURT: Mr. Butner on those --

MR. BUTNER: Let's start with Mr. Kalmback. We just found out about Mr. Kalmback. We haven't known about him for months and months as alluded to by the defense. We found out that at a certain point in time, a couple of months

or so, he shared or was in a cell with Mr. DeMocker, and they had communication, and Mr. DeMocker made statements to Mr. Kalmback. We only just found out about that. We disclosed it within a matter of a few days of finding out about that and getting his statement.

In terms of diligence, we have been exercising diligence. And as Mr. Sears alluded to before, that has been an on-going investigation in terms of all of the people in the jail that had contact with Mr. DeMocker or could have been communicating through the jail vents. So you can only imagine what that was like.

THE COURT: What does he purport to say with regard to statements by the defendant?

MR. BUTNER: He purports to say, and this was -- an audio disk of this interview was provided with the disclosure. He purports to say that Mr. DeMocker told him he was riding his bike by the area of the victim's house on the day of the homicide or the day before.

THE COURT: Pryor.

MR. BUTNER: Dan Pryor is a witness that has obtained custody of the records of registration -- ownership and registration of the motorcycle that was bought by Mr. DeMocker. Basically is an MVD type of records custodian, to my understanding. I don't know why we have a Detective Dan Pryor from D.P.S. doing that, other than maybe the

sheriff's office used him. But it is a records custodian type of capacity concerning the motorcycle and its purchase.

THE COURT: I know who Karen Gere is. Why is she only now disclosed?

MR. BUTNER: Karen Gere assisted in the autopsy and was not really mentioned in any reports or anything. We found out she assisted in the autopsy, and in fact, she was the person that was doing the fingernail clipping, and so --

THE COURT: It comes as no great surprise to me, but maybe comes as a surprise to the defense. Why wasn't she listed earlier?

MR. BUTNER: I don't know, Judge. We really didn't know that Karen Gere was the person that did the fingernail clipping.

THE COURT: Greenhow.

MR. BUTNER: Greenhow is mentioned as an appraiser in the Provident Mortgage records, and Mr. Greenhow -- I think it's a Mr. but maybe it's a Ms. -- prepared a floor diagram, floor plan of the residence, that kind of thing.

THE COURT: Ms. Kennedy's residence?

MR. BUTNER: Pardon me?

THE COURT: The Bridle Path residence?

MR. BUTNER: Right. Bridle Path residence.

THE COURT: Any other comments that you want to make on why I should allow these various folks in?

MR. BUTNER: Well, certainly due diligence has been executed in regard to Mr. Kalmback, Your Honor. That is an exhaustive type of an investigation, and it took a great deal of time to even find where he was located ultimately in the Department of Corrections. Of course, we will provide a criminal history concerning Mr. Kalmback. And the statement that was made to him is, I think, a very important one, very significant in this case by the defendant.

In terms of the MVD records, we can put that record in concerning the purchase of the motorcycle by way of certified copies from the Department of Motor Vehicles.

THE COURT: Is that really a contested issue?

MR. BUTNER: I am not sure if it is a contested issue, but I can't rely upon speculation about that.

THE COURT: Gere.

MR. BUTNER: Gere is important because she clipped the fingernails. And we weren't aware that she was exactly the person that was doing that. I should have realized that, I will tell you, Judge, because I knew that she always assisted Dr. Keen there, but it was not brought to my attention. We didn't find it out until much later.

THE COURT: The import of having the appraiser's Bridle Path diagram as opposed to something else?

MR. BUTNER: Not much.

THE COURT: Ms. Chapman.

MR. BUTNER: We were not really going to use that, probably.

THE COURT: Ms. Chapman.

MS. CHAPMAN: Your Honor, with respect to Mr. Kalmback, Mr. Calmbach's name was identified in July of '09 to the State when they did the free talk with Mr. DeMocker. Mr. Kalmback can be located in the Department of Corrections by looking on the Department of Corrections Website, and could have been so located in July of '09 when the State learned of his identity.

I don't know how interviewing him and disclosing that in April of 2010 is an exercise of due diligence. I would suggest that it is not. Mr. Kalmback also says that he has done so many drugs that he doesn't really know what he is talking about. So, I'm not sure how relevant his statements are. But with respect to the due diligence, the State was certainly aware of him in July of '09, and that he was in the same facility with Mr. DeMocker. He wasn't a cellmate, as Mr. Butner suggested. He was in the vicinity and he was identified.

With respect to Miss Gere, Your Honor.

Miss Gere's name did come up early on in this case, because I believe there was testimony related to her involvement in the autopsy at the first or second Grand Jury. I believe it was the first Grand Jury. She was not identified as a witness at any time by the State. They were certainly aware of her at the time of the first or second Grand Jury, and they didn't identify her as a witness. She was not identified in those reports as having conducted the fingernail clipping. She was identified as having some knowledge about the fingernail clippers, but apparently her knowledge was equivocal at that time and she was not identified as a witness.

I would just note that what we know, based on what Sorenson discovered yesterday, Mr. DeMocker is excluded from any profile under Miss Kennedy's fingernails based on Sorenson's examination.

So with respect to Miss Greenhow, again, I don't know how a floor plan of the residence is relevant, and I don't know why that would just be disclosed to us now, less than a week before trial.

So we would ask that all of these witnesses be late disclosed -- be excluded based on their late disclosure and based on the absence of due diligence in identifying them to the defense.

THE COURT: I will grant the request with regard to Greenhow. I will deny the request with regard to

Gere. I will deny the request with regard to Pryor.

Kalmback, let me talk to you about that next week. I want you to have listened to the transcript -- or listened to the audio or done the transcript before I finally decide that one. I am leaning toward allowing him, but I think I need to have a little bit more information after you have had some solid footing.

The custodians of records with regard to Amazon and State Department, I am not going the preclude those.

MR. SEARS: We have a transcript of the audio recording of this interview with Mr. Kalmback that we will provide by e-mail to the Court and to the prosecution in this case.

THE COURT: Any problem with that, Mr. Butner?

MR. BUTNER: I would like to look at the transcript, yes.

THE COURT: Any problem with his providing it to the Court?

MR. BUTNER: No. There is no problem with it.

THE COURT: I will authorize you to provide it to the Court via e-mail and take under advisement that one.

MR. SEARS: One fact I would like you to consider that Ms. Chapman was not aware of. I was involved in the free talk with Mr. Robertson in July of 2009. What

was done was the prosecution obtained booking photos of a range of inmates that were housed with Mr. DeMocker, including Mr. Kalmback, and showed them to Mr. DeMocker to see if he could identify them has possibly being the person who was speaking anonymously through the vent to him. And there is a reference in the report related to Mr. Kalmback that we were just disclosed, in which Mr. DeMocker expressed some doubt that Mr. Kalmback was the person involved.

So, I think there can be no question that the State was aware that Mr. Kalmback was housed in the vicinity. He was in the cell block. He was within the range of people that could have been the voice in the vent, that Mr. DeMocker talked about him, that Mr. DeMocker was shown a picture of Mr. Kalmback at that time, and said that, frankly, he didn't think it was him, because if that was the person he thought, he thought that person had a cleft pallet and a distinctive manner of speaking.

I am not sure whether that is true or not, but that is the state of the State's awareness of Mr. Kalmback in July of 2009. I don't think the State would seriously dispute that.

THE COURT: What other issues do I have, it is 25 after 5:00, that you need to have resolution of before Tuesday?

MS. CHAPMAN: Your Honor, I have a point of

clarification about the order that you just made, and then the Anonymizer motion to quash. And then I have a question about how you would like to proceed with respect to disclosure that was made today without the requirements under 15.6(d). Those are the three things, I think. And we can do them pretty quickly.

With respect to Miss Gere, is it Your Honor's order that she is not precluded?

THE COURT: She is not precluded.

MS. CHAPMAN: Could we ask that the State be required to provide some kind of proffer about what she might say, since we have no reports from her.

MR. BUTNER: I don't have a proffer.

MS. CHAPMAN: Well, if the State doesn't know what they are offering her for, Your Honor, I would suggest that she ought to be precluded.

THE COURT: I am not going to require the State to produce something that hasn't been produced. I recognize what Ms. Gere's role was in assisting autopsies. I won't let her testify without you having had an opportunity to interview her, but I think an interview can probably be rapidly arranged.

I will deny the request to preclude her.

MS. CHAPMAN: Your Honor, I guess the other issue is with respect to Anonymizer. There was a subpoena

issued on March 31st. No copy was provided to the defense. It was provided to the defense ultimately by Anonymizer's counsel on April 15. The response dated May 4th. The State didn't file any 15.6 motion. They have been aware of this software since December of '09. They listed in the computer forensics report that they evaluated Mr. DeMocker's hard drive. They discovered this software. They knew what the software was, what it was called and what it did since December of '09. They didn't subpoena it until March, 2010. They didn't notify us. They didn't notify the Court. They didn't comply with 15.6. We have seen no response from Anonymizer.

THE COURT: Mr. Butner.

MR. BUTNER: First of all, I think we have a right to issue a subpoena to get the records from Anonymizer. They have a right to object to us using the records, if in fact, they don't comply with the Rules of Procedure. But we haven't gotten the records from Anonymizer. And they may contain evidence that might be quite significant in this case. It is some sort of a program that keeps records secret on computers. That is why we subpoenaed that stuff.

THE COURT: Miss Chapman.

MS. CHAPMAN: Well, Your Honor, they might have a right to subpoena it. What the objection is is that they also have an obligation to exercise due diligence, and

waiting between December of '09 and March of 2010 to request the records and to issue the subpoena is not an exercise of due diligence. And it is a waste of our time and of the Court's time to continue to permit them to seek this evidence when it is going to be out of time and not provided in the course of them exercising the due diligence they are required to under the rule.

THE COURT: I will deny the request to quash the subpoena. That has no bearing on whether I will allow the evidence in, if there is ever any evidence that comes in.

MS. CHAPMAN: Your Honor, the last issue is that we received disclosure today, and we have received some other late disclosure that I intend to file motions about, but I wanted to know whether you wanted us to proceed with filing motions to preclude, or whether the State is going to be required to make motions under Rule 15.6(d), which we would then respond to with respect to disclosure that is made within the seven-day time frame. I haven't seen any motion and the rule requires a motion and an affidavit to use this material.

THE COURT: If they haven't complied with the rule, I won't let the evidence in. If the State complied with the rule, then I may need from you a motion at that point.

MS. CHAPMAN: Thank you.

THE COURT: All right. It is 5:30. Any other urgent matters that we need to cover today?

MR. BUTNER: Nothing further from the State at this time, Judge.

THE COURT: Mr. Sears, anything else for the defense?

MR. SEARS: I don't believe so, Your Honor. Thank you.

THE COURT: All right. The next hearing, I think I would like the defendant and counsel here at eight o'clock on the 4th.

MR. SEARS: Your Honor, you had directed Mr. Butner to provide a report to the Court about a number of matters related to Mr. DeMocker's transport. You asked him to find out particularly what was happening at the sheriff's office regarding the searches of his legal documents. We haven't heard that. You previously ordered that Mr. DeMocker be dressed out at the jail and not dressed out here. That hasn't happened. I would ask you to reaffirm that order that he not be brought over here in orange, that he be allowed to dress out at the jail.

THE COURT: I will reaffirm that order that he be dressed out at the jail. When you say jail, you mean 255 East Gurley?

MR. SEARS: Yes. Where we have his clothes

each day.

There are matters we are going to have to take up pretty soon here regarding Mr. DeMocker's hair cutting. In brief, the haircut situations, the haircuts are done at the jail. If Mr. DeMocker is in court, there is no makeup, backup, alternative plan. He is going to miss all the haircuts, and it is going to become a problem, sooner rather than later.

We also need to talk with the Court about visitation. Mr. DeMocker has sent two inmate requests out asking for special visitations on non-trial days, and he's been denied both times. So he's likely not to have any visitation rights during the trial.

And Mr. Butner was also going to inquire about whether Mr. DeMocker needed to be restrained in the video conferencing room.

MR. BUTNER: The things that I was to inquire about were being restrained in the video conference room. I was told that is a matter of jail policy and it is necessary for security. And that is just the way it is.

In terms of the search of his cell and legal documents looked through when he is not there. They search when he is not there. They search when he is there, too, Judge. They are not reading his legal documents, but they search to make sure that there are not metal objects or

something that got in the legal documents.

In terms of his notes being maintained, he can keep his notes in an envelope. But they are still going to continue to search. They don't read the notes, but they want to make sure that there are no objects in there other than the notes.

I believe those were the things that I was instructed to check on.

MR. SEARS: Your Honor, that seems utterly unnecessary. It is one thing to have a policy about security and restraining a person in a closed room where he is alone by himself, which makes no sense. But there is absolutely no need for his property to be searched when he is not there for contraband or objects when the search is limited to his legal papers. I have a difficult time believing that they find the need to do that on documents that have been searched when they come into the jail. There is no place for him to get additional contraband into those documents.

I would ask the Court to order them to stop doing that, and if they find the overwhelming need to search his legal papers, do that in his presence, so he can see that they are simply looking through them and not reading them. I, frankly, don't believe them.

MR. BUTNER: They aren't just searching his legal documents. They are searching all of his papers and

the entire cell. That is what I was informed.

THE COURT: I am going to deny the request.

Anything else?

MR. PAUPORE: One thing, Your Honor. This is a special action. I was told -- I have got the Court's copy. I don't know if you got it. I am just following an order.

THE COURT: I haven't been served with anything.

MR. PAUPORE: And I have a copy for Mr. Sears, but I was told --

THE COURT: Did you all advise the Court of Appeals that we are selecting a jury for this case on the -- commencing on the 4th?

MR. BUTNER: I am not sure if they were advised of that, Judge. I did note I saw an order today that this was set for some sort of argument on the 19th.

THE COURT: I see that. All right.

Thank you. Stand in recess.

(Whereupon, these proceedings were concluded.)

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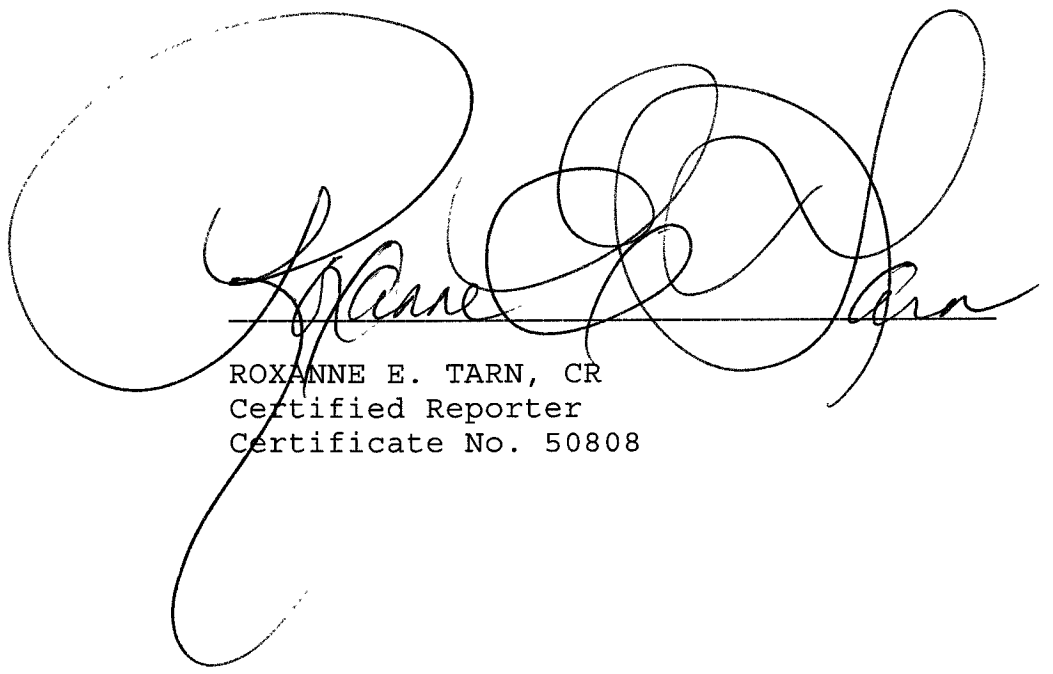
C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages 1 - 222 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 17th day of May, 2010.



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